



**REPUBLIC OF KENYA**

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

**CRIMINAL CASE NO. 3 OF 2006**

**REPUBLIC.....PROSECUTION**

**VERSUS**

**BRIAN KARIUKI.....ACCUSED**

**J U D G M E N T**

**A. Introduction**

1. The accused person faces a charge of murder contrary to **Section 203 as read with Section 204 of the Penal Code**. The particulars of the offence are that on the 14<sup>th</sup> and 15<sup>th</sup> February 2006 at Gichiche sub-location in Embu District within the then Embu Province, the accused murdered Lydia Igandu.
2. The prosecution called eleven (11) witnesses in support of their case whose evidence is summarised herein.

**B. Prosecution Case**

3. PW1, James Nyaga Munyi, the senior assistant chief of Gichiche testified that he received a report that a body had been spotted at Gichichi market which he later saw in a residential house. He noticed multiple cuts on the body, eyes gouged out as well as a hand cut off and later removed the body to Embu Provincial Hospital mortuary.
4. PW2, the owner of Toplife Hotel said he was well acquainted with the accused as he was a regular customer in his hotel almost on daily basis. He testified that on the 14/02/2006 around 1.00 pm, he saw the deceased enter the accused's house which was located next to PW2's hotel and did not come out on that day. He was able to identify the clothes the deceased was wearing on the material day. He further testified that the deceased knew the accused whom she used to regularly exchange greetings.
5. PW3 testified that on the 12/02/2006, the deceased handed him a Valentine wishes card to give to the accused demonstrating their acquaintance. It was left in the kiosk of one Munene next to the residence of he accused for onward transmission to him. He knew the accused and the deceased as lovers.
6. PW5 testified that on the 16/02/2006 at around 10.00 pm at Government Quarters Gichiche, she met a man, who had put on gloves, carrying a body of a lady on his shoulders. The body was dressed in a red T-shirt and pair of blue trousers. PW5 later identified the accused in an identification parade as the man she had seen on the material evening. He was carrying a human body.
7. PW6, a government analyst based at the government chemist in Nairobi testified that he received a blood stained knife and two blood samples one belonging to the accused and the other to the deceased from Runyenjes Police Station. He was requested to compare the blood samples and testified that upon analysing the samples. He found that the blood on the knife matched that of the deceased.
8. PW7, Dr. Stephen Maina, testified that he examined the accused on the 16/03/2006 and found him mentally fit to stand trial. PW8, Chief Inspector Dishon Mutua testified that he was the former OCS Runyenjes from 2004-2007 and that as part of the investigations of the deceased's death, he carried out an identification parade wherein the accused was positively identified by PW5 as the person she had seen carrying the dead body of a lady on the material evening.
9. PW9, PC Said Ibrahim testified that his investigations led him to the accused's house wherein he carried out a search and was able to recover a blood-stained knife which together with blood samples of the deceased and the accused were sent to the Government Chemist for analysis.
10. PW10, Dr. Moses Njue, on behalf of Dr. Njau a forensic pathologist, carried out the post-mortem on the deceased and formed the opinion that the cause of death was trauma as a result of physical assault.

### **C. Accused's Case**

11. The accused in his defence testified that on the 14/02/2006 he was at home in Gichiche village in the morning hours. He later left home to go meet his mother at Kyeni hospital and on the way met one Bancy Mukami, DW3 and the deceased. The accused testified that he left the deceased in the company of DW3 and proceeded to meet his mother after which they both travelled to Nyeri and was to return returned home on the 17/02/2006. He also testified that he was arrested on the 20/02/2006 and upon search of his cousin's house where he used to spend the night, a knife was recovered. The accused testified that the knife had no blood on it but was broken as it had been used to repair a TV aerial. The accused denied being in any close relationship with the deceased.

### **D. Accused's Submission**

12. It was submitted on behalf of the accused that the evidence of PW5 could not be believed as she failed to raise an alarm upon seeing someone carrying a body. Further it was submitted on behalf of the accused that failure by the police to produce an inventory indicating that the knife was recovered from the accused person's house leads to a situation where the prosecution was guessing as to the recovery details.

13. It is further submitted that it was not been established how the deceased died and by who and further that the post mortem report was not conclusive as to the cause of death of the deceased as decomposition had taken place.

14. It was submitted that the defence evidence was not challenged by the prosecution and that it was clear that the accused was not at Gichiche village at the time the deceased died and as such the prosecution's case had not been proved beyond any reasonable doubt. It was further argued that the circumstantial evidence relied on by the prosecution did not pass the test set in the case of **Abanga alias Onyanga v Rep CR A No. 32 of 1990 (OR) quoted in Solomon Kirimi M'rukaria v Republic [2014] eKLR.**

15. The accused further submitted that the prosecution failed to prove that the accused had malice aforethought to kill the deceased and as such the offence of murder has not been proved.

### **E. Analysis of the Law**

16. The issue for determination is whether the prosecution have discharged the burden of proving guilt on part of the accused person beyond any reasonable doubt to sustain a conviction for the offence of murder.

17. In order to discharge the burden of proof, the prosecution has a duty to establish the following elements:

*i) the death and cause of death of the deceased;*

*ii) that the accused caused the death through an unlawful act or omission; and*

*iii) if the accused possessed the intention to cause harm or kill or malice aforethought.*

18. Section 203 of the Penal Code provides: -

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

19. Section 204 of the same Code is the penal section in regard to a conviction for the offence of murder.

20. The postmortem on the body of the deceased was carried out by PW10, Dr. Moses Njue, on behalf of Dr. Njau and he formed the opinion that the cause of death was most probably trauma as a result of physical assault.

21. It is imperative to note that none of the prosecution witnesses saw the accused kill the deceased. However, there is circumstantial evidence from PW1, PW3, PW4 and PW5. This court has an obligation to analyze the evidence with a view of determining whether it meets the threshold of evidence that is capable of sustaining a conviction.

22. In the case of **Republic Vs Michael Muriuki [2014] eKLR** the court stated: -

*“In Sawe – V- Republic (2003) KLR364, the Court of Appeal held:*

*1. In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypotheses than that of his guilt.*

*2. Circumstantial evidence can be a basis of conviction only if there is no other existing circumstances relied on.*

*3. The burden of proving facts will justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution. This burden always remains with the prosecution and never shifts to the accused.*

*4 .....*

5 .....

6 .....

**7. Suspicion, however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt.”**

23. In the case of **ABANGA alias ONYANGO V REPUBLIC CR. ANO.32 OF 1990 (UR)** the Court of Appeal set out the principles applicable in order to determine whether circumstantial evidence adduced in a case are sufficient to sustain a conviction. These are:

**“It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests:**

**(i) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;**

**(ii) those circumstances should be of a tendency unerringly pointing towards guilt of the Accused; and**

**(iii) the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability was committed by the accused and none else.”**

24. The evidence of PW2 the owner of Toplife Hotel which was adjacent the house of the accused was that on the date the deceased went missing, he saw her enter the house of the accused who was her close friend and a regular host on temporary basis. After she entered the house, she was not seen leaving on that day.

25. The evidence of PW3 is that the deceased who was her cousin visited their home at Gichiche on 12/02/2006 and gave him a Valentine wishes card to take to the accused. The deceased had disclosed to PW3 that the accused was her boyfriend at the material time. PW3 proceeded to the house of the accused and found the house locked. He then handed over the card to one Munene who operated a kiosk next to the house of the accused. PW3 said that Munene later confirmed that he had delivered the card to the accused.

26. PW5 testified that she lived in the Government Quarters at Gichiche whereas the accused lived near the quarters. She knew him by appearance but not by name for they used to meet on the common road regularly as each went on their day to day errands. In the evening of 16/02/2006 at around 10.00 p.m., PW5 left her house to go to the shops and met the accused carrying to body of a lady on his shoulders dressed in a red t-shirt and a pair of jeans. It was a night with bright moonlight and she was able to see the accused. She later positively identified the accused in an identification parade after he was arrested. PW5 saw the accused walk towards an abandoned government house where the body of the deceased was discovered the following day by members of public.

27. PW4 the father of the deceased said that his daughter left home on 14/06/2006 and was not seen for three (3) days until he learnt on 17/02/2006 that she was no more upon discovery of her body in the abandoned house at Gichiche.

28. PW6 the government analyst conducted analysis of the blood-stained knife recovered from the house of the accused after the incident. The analysis of the knife with the blood samples of the accused and deceased was done and positive results achieved.

29. PW9 the investigating officer arrested the accused in Embu town on 20/02/2006. The accused led the witness to his house where the blood-stained knife was recovered.

30. The alibi defence of the accused was dislodged by the evidence of PW5 who saw the accused around 10.00 pm on the material day on 16/02/2006. PW3 said he knew the accused well who lived next to his hotel. The accused had occupied the house for about 2 – 3 months according to PW3. It is the following two days 15<sup>th</sup> and 16<sup>th</sup> February 2006 that PW3 saw the house of the accused locked from outside which signals tht the accused was not in the house.

31. In his defence the accused talked of having gone to Nyeri for a burial with his mother and aunt, yet he called his grandmother DW2 as his witness whom he did not mention in respect of the Nyeri journey. The witness contradicted the evidence of the accused in that she said that the accused went to Nyeri on 12/02/2006. The accused had said it was on 14<sup>th</sup> in the morning that the left for Nyeri.

32. Although DW3 said the accused told her he was going to Nyeri on the morning of 14<sup>th</sup>, leaving the deceased in her company, there was no evidence that the accused left Gichiche area that morning. DW3 said she was with the deceased for a short while around 9.00 am in her salon but the deceased later left after receiving a telephone call.

33. During cross examination, the accused did not put any questions to the prosecution witnesses to support his alibi which leads me to the conclusion that the alibi was an afterthought on his part.

34. I found the evidence of the prosecution witnesses credible and in particular PW2, PW3, PW5 and PW9. PW5 had seen the accused several times on the road in their common neighbourhood. The identification parade conducted by PW9 was necessitated by the fact that PW5 did not know the name of the accused. The positive identification confirms it is the accused who was seen carrying the deceased’s body to the abandoned house on the evening of 16/02/2006. The body was discovered there the following day.

35. The defence argued that no inventory was signed by the accused to confirm that there was any recovery. PW9 testified that it is the accused who led him to his house where the recovery was made. PW9 would not have therefore gone to the house of the accused’s cousin as alleged since he ws assisted by the occupier of the said house. The evidence of PW3 and PW4 confirmed tht the accused and nobody else

lived in the house adjacent to the hotel of PW3 and next to Munene's kiosk.

36. If indeed the house was at the material time occupied by the cousin of the accused who was not named or identified, how did the accused know that the knife recovered there was broken and that it had been used to repair a TV aerial? How come the accused never said in his defence where he lived if not in the house the blood-stained knife was recovered.

37. The deceased was in good health when she left her parents' home on 14/02/2006. She was seen entering only one house, that of the accused to which she was a frequent visitor. There was no evidence that she ever left that house and the next time she was seen she was dead.

38. The accused lived near where he was seen dumping the body according to PW5. In my view, the accused was the only one at that material time and in the circumstance prevailing then who had the opportunity of assaulting the deceased. The dumping of the body leaves no doubt that the accused himself or people know and with his knowledge, caused the death of the deceased.

39. I found the evidence of PW5 credible and not out of character with what PW2 and PW3 told the court. It is important to note that the witness did not know the accused before the incident and would have no reason to frame him. PW5 knew not the deceased and had no interest in the case.

40. The denial of the accused that he had no close relationship with the deceased was disapproved by the evidence of PW2 and PW3 who knew him and had witnessed the deep acquaintance.

41. The defence argued that the cause of death was not conclusively established. PW10 found very severe injuries on the body of the deceased and explained that the use of the words "most probable" were because the opinion of an expert is never 100% conclusive but mostly 90 -99%. I have no doubt from PW10's evidence that the cause of death was trauma from severe injuries inflicted on the deceased.

42. The following inculpatory facts emerge from the evidence: -

a) *That the deceased was last seen alive and in good health on 14/02/2006 around 1.000 p.m. when she entered the house of the accused.*

b) *That the body of the deceased was recovered three days later in the neighbourhood of the accused after PW5 saw him carrying it the previous night towards where it was recovered the following day.*

c) *That the body was recovered dressed the same way the deceased was dressed on 14/02/2006 when she went missing.*

d) *That on 14/02/2006 which was valentine day, the deceased and the accused were seen both dressed in red T-shirts and in blue jean trousers.*

e) *That the murder weapon was recovered from the house of the accused with his help.*

f) *That the blood stained knife recovered from the house of the accused had the blood of the deceased on it whereas the injuries inflicted were consistent with a sharp object.*

g) *That the deceased and the accused were known to be lovers as confirmed by PW3 and by PW2 who regularly saw them exchange greetings and pleasantries as the deceased visited the accused.*

43. In my considered opinion, the foregoing inculpatory facts are compatible with the guilt of the accused and that there exists no other circumstances that point guilt to any other person but the accused.

44. It is my finding that the prosecution have established that the accused whose house the deceased was on the day she went missing and who was seen dumping her body in an abandoned house inflicted or caused to be inflicted the severe injuries that caused the death of the deceased. He is therefore responsible for the *actus reus*.

45. In regard to determining the existence of malice aforethought, **Section 26 of the Penal Code** is a good guide. It provides: -

***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 is 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 nor, although such knowledge is accompanied by indifference whether death of grievous bodily harm is accused 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"***

46. The severity, nature and extent of the injuries as described in the post-mortem report speak for themselves. The whole left arm and other body parts were missing. It had haematoma on both the upper and lower limbs, distended veins and the lungs had collapsed due to severe internal bleeding.

47. By inflicting such injuries of grave nature, the accused had intention to end the life of the deceased or to cause grievous bodily harm which is consistent with Section 206 (a).

48. It is my finding that the prosecution have established the existence of malice aforethought on the part of the accused.

49. Consequently, I find the accused guilty of murder and convict him accordingly.

50. It is hereby so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 25<sup>TH</sup> DAY OF SEPTEMBER, 2019.**

**F. MUCHEMI**

**JUDGE**

**In the presence of: -**

**Ms. Mati for State**

**Ms. Muthoni for Accused**

**Accused present**