



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CRIMINAL CASE NO. 21 OF 2016

REPUBLIC.....RESPONDENT

VERSUS

MARGARET WANJIKU BETH.....APPELLANT

JUDGMENT

1. Margaret Wanjiku Beth (“Accused Person”) is charged with the offence of murder contrary to section 203 as read together with section 204 of the Penal Code. She is accused of killing Daniel Njuguna Mburu (“Deceased”) with malice aforethought on 09/03/2014 at Kihingo Location within Kiambu County.
2. The Accused Person pleaded not guilty to the charges and the matter was set down for a fully-fledged hearing at which the Prosecution called nine witnesses. At the close of the Prosecution case, the Court was put on her defence. She elected to give an unsworn statement and called no witnesses.
3. The evidence that emerged from the trial was as follows.
4. George Waiganjo owns a shop in a place called Kangangi just outside Kiambu town. On 09/03/14 at around 3:00pm, he was in his shop when the Accused Person, who was a customer, approached him. He knew her from previous interactions at the shop. The Accused Person inquired if George had the telephone number for Mama Njuguna (Margaret Wambui Mbaru).
5. George confirmed that he had the number. He inquired what she wanted. She told George that Njuguna had fallen while drunk and she needed to call his mother so that they can take him to the hospital. She said Njuguna was bleeding profusely. George gave her Mama Njuguna’s number. She stepped aside and made the call. George could overhear the conversation. After 5 – 10 minutes, Mama Njuguna came over and she and the Accused Person walked away together.
6. Later, fifteen or so minutes later, George heard people screaming. He came out of his shop and saw a crowd of people. They were saying that Njuguna had died. He could see Mama Njuguna who was being consoled by a group of women.
7. George asked one of the people what had happened. He was told that Njuguna had been stabbed and was bleeding.
8. Margaret Wambui Mburu is also known as Mama Njuguna and is the person referred to in George’s testimony. She testified as PW1. She is the Deceased’s mother. In her testimony, she corroborated George’s story about receiving a phone call from the Accused Person around 3:00pm on 09/03/2014.
9. She recalled that she was with her friend, Grace on a PSV Vehicle. They were going to Ikinu to visit their friend who was unwell. She received a call from the Accused Person. Mama Njuguna says that the Accused Person told her on the phone that she should urgently go back home. Shocked by the call, she alighted and rushed to the shop where the Accused Person said she was. Mama Njuguna says that when she found the Accused Person by George’s shop, the Accused Person told her that she should go and witness her son dying. Mama Njuguna testified that the Accused Person told her that she and the Deceased had argued about Kshs. 70/- and that the Deceased had then thrown himself onto a knife in fury. According to Mama Njuguna, the words the Accused Person used was that “alijirusha juu”.
10. Mama Njuguna followed the Accused Person to their house in Karaho – about 1.5 kilometres away. On the way, she met a friend of the Deceased by the name Wa Ndung’u whom she requested to accompany her. On arriving at the house, they found the Deceased lying by the verandah on his back. His young child was by his side crying. In shock, Mama Njuguna tried to lift the Deceased but realized he was lifeless.
11. Mama Njuguna testified that she unbuttoned the Deceased shirt and noticed a large stab wound on his chest. She started screaming hence attracting a large crowd.

12. At that point, some friends accompanied her to her home as other people organized for a vehicle to rush the Deceased to the hospital.
13. Later, she was asked for money and her ID card so that the Deceased could be admitted at the hospital. She then decided to go to the hospital. On reaching there, however, she learnt that Njuguna had already passed on.
14. In her testimony, Mama Njuguna recalled that when they got to the Deceased's house, the Accused Person started packing her things and disappeared. According to Mama Njuguna, the Accused Person did not tell anybody where she was going and why. The Accused Person never went back home and did not even attend the burial. She was arrested more than a year-and-a-half later when she returned nearby to visit her own family and an informer told the Police.
15. On cross-examination, Mama Njuguna clarified that the Accused Person told her to go witness her son dying in person – and not on the phone as recorded in her statement.
16. Mama Njuguna admitted that her son used to drink heavily but she insisted that he was never violent when drunk.
17. Richard Wandungu corroborated the part of Mama Njuguna's narrative about meeting on the way to Karaho and walking together to the Deceased's house. He testified that they found the Deceased lying on his stomach on the verandah outside his house. Richard says he could see through the Deceased's unbuttoned shirt that he had a deep stab wound in his chest on the left side. There were no rocks or stones near where he was lying. Upon a casual observation, Richard concluded that the Deceased was dead.
18. Grace Njeri Wainaina was in the company of Mama Njuguna when she got the call from the Accused Person. She testified that Mama Njuguna hurriedly alighted after receiving the call and promised to come back. After waiting for more than 45 minutes, Grace called Mama Njuguna and learnt the news that the Deceased had been stabbed. She later saw a crowd of people, and a group of women consoling Mama Njuguna. That is when she learnt that the Deceased had died. She, too, went to console Mama Njuguna.
19. Nobert Kariuki Wathome testified that on 09/03/2014, he was mending a fence in the home of a man called Mburu when he heard Mama Njuguna screaming that Njuguna had been stabbed. He ran to where Njuguna used to live and was joined by a group of other people who heard the screaming.
20. On reaching the scene, Nobert testified that they found the deceased sprawled near his door with a knife wound on his left chest side. On touching him, Nobert felt that the Deceased was still warm so they thought he was still alive. They carried him to K.K Building where a Tuk Tuk belonging to Kamindi supermarket agreed to take him to Kiambu Hospital. The doctor asked them to remain outside as he tried to save the Deceased's life. However, 15 minutes later, the doctor told them that Njuguna had died.
21. Together with George and Ngige and others Nobert went to the Police Station to report. He then accompanied some Police Officers to the scene.
22. Patrick Kibugi Mburu, a brother to the Deceased, got a call from their mother to urgently go to Kiambu Hospital where the Deceased had been rushed. He did so but found him already dead at Kiambu Hospital. Four days later, Patrick accompanied Police Officer Osodo to the City Mortuary to take the body of the Deceased for Post mortem examination. He identified the body and the autopsy was conducted by Dr. Dorothy Njeru.
23. APC Ramadhan Shindano, Force No. 239302, was one of the arresting officers. Attached to Kiganjo Administration Police Camp in Gatundu South Sub-County. He received a warrant of arrest for the Accused Person from Kiambu Police Station. With the cooperation of the area Assistant Chief and some members of the public, he arrested the Accused Person after the Assistant Chief had confirmed her identity. After a call was placed to Kiambu Police Station, Sergeant Osodo went and picked up the Accused Person from the AP Post where they were holding her.
24. Sergeant Philip Osodo, Force No. 66441, was the Investigating Officer. He testified that his investigations revealed that the Accused Person lived with the Deceased in a "come-we-stay" relationship. He concluded that on 09/03/2014, there was a quarrel between the Accused Person and the Deceased and then the Deceased was found lying next to the door afterwards. He had injuries inflicted on him and he could not talk.
25. Sergeant Osodo recorded statements of the witnesses and thereafter escorted the relatives to City Mortuary to identify the body of the Deceased for post mortem examination. Sergeant Osodo concluded that the Accused Person had stabbed the Deceased and, upon the recommendation of the DPP, charged her in Court with the offence of murder.
26. Dr. Dorothy Njeru was the pathologist who performed autopsy on the Deceased on 13/03/2014 at work at City Mortuary. She found the body of the Deceased had a stab wound on the left eye caused by a sharp object. She also found a stab wound on the chest – caused by a sharp object. Inside, she found a wound/injury on the heart. This injury had caused bleeding into the heart. There were no other injuries or diseases.
27. Dr. Njeru concluded that the death was caused by the stab wounds on the eye and chest caused by a sharp object. She produced the Post Mortem Report as an exhibit.
28. On cross-examination, Dr. Njeru testified that the injury in the eye was in the left caters – the extreme left side of the eye. It was a penetrative injury that went as far as the eye ball into the bone supporting the eye ball. She concluded that it was caused by a sharp object. She further concluded that the two injuries were probably caused by the same sharp object since the pattern was the same.

29. The Court visited the scene of the crime. The Court noted that the scene was a line of residential one-roomed houses made of corrugated iron sheets all around. There were 4 rooms in a single line. The Deceased used to live in the 2nd house. The line of houses is somewhat relatively isolated with the next buildings about 20 metres away. It is at the bottom of a slant providing a vintage look from a top the hill into the houses. The house is about 0.5 Kms into the main road (Kiambu-Ndumberi Road) and probably one kilometer to the market which Mama Njuguna spoke about.

30. Put on her defence, the Accused Person gave an unsworn statement. She stated that on the material day, she woke up early and went to work as a domestic worker – cleaning the house of a customer. She told the Court that she remained at work until around 11:30AM. When she went back home with her child. She said she was tired and decided to take a nap. She sent the child to buy milk and bread for lunch. They ate and then napped.

31. In the midst of her nap, the Accused Person told the Court that he heard her husband knocking the door. The door was not locked so he went in. He was very drunk. His clothes were dusty and soiled. He asked if the Accused Person had made lunch. She told him she had not made lunch. She offered to cook for him but he declined the offer and said he would go eat at a restaurant. He left.

32. The Accused Person says that she and her child went back to bed. The Accused Person told the Court that after sometime, she heard a knock on the door. It was Njoki, a neighbour. Njoki reportedly told the Accused Person to come out in a hurry because her husband was outside and had fallen on the ground. The Accused Person says that she came out and found the Deceased lying on his stomach outside their house.

33. She decided to go call his mother to take him to the hospital. It is at that point that the Accused Person says she decided to go call Mama Njuguna. On not finding her at home, the Accused says she asked for her number from George and made the call to Mama Njuguna.

34. The Accused Person told the Court that she accompanied Mama Njuguna back to her house where they found the Deceased lying on the verandah. When Mama Njuguna started screaming and a huge crowd formed, the Accused Person says that some people advised her to run away for her own safety. So, she says, she packed her bag and left. She says she did not even know the Deceased had died until she was arrested and charged with the present offences. She insisted that she did not kill the Deceased.

35. The offence of murder is defined by section 203 of the Penal Code, Cap 63, Laws of Kenya as follows:

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

36. To successfully obtain a guilty verdict in a murder charge, the prosecution, therefore, is required to tender proof beyond reasonable doubt of the following three crucial ingredients:

- a. That death of the victim occurred (actus reus);*
- b. That the death was caused by an unlawful act or omission by the Accused Person; and*
- c. The unlawful act or omission was actuated by malice aforethought.*

37. On the other hand, malice aforethought is established, under section 206 of the Penal Code, when there is evidence of:

- a. Intention to cause death of or grievous harm to any person whether that person is the one who actually died or not; or*
- 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 not; or*
- c. Intent to commit a felony; or*
- d. 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.*

38. In the present case, it is true, as the Defence attorney, Mr. Muchiri points out, none of the witnesses who testified saw the Accused Person stabbing the Deceased. Mr. Muchiri is, therefore, surely right that the Prosecution relied entirely on circumstantial evidence to prove its case. Mr. Muchiri says that this considerably weakens the Prosecution case and makes it impossible for it to establish its case beyond reasonable doubt.

39. This is not necessarily true. Indeed, a South African case has quite forcefully and felicitously put the matter straight thus:

Circumstantial evidence may be the more convincing form of evidence. Circumstantial identification by fingerprint will, for instance, tend to be more reliable than the direct evidence of a witness who identifies the accused as the person he or she saw but obviously there are cases in which the inference will be less compelling and direct evidence more trustworthy. It is therefore impossible to lay down any general rule in this regard.

State v Musingadi & Others [2005 \(1\) SACR 395](#) (SCA).

40. It is true that the Prosecution must place on the table more than mere suspicion and that suspicion, however strong will never be a substitute for evidence. So said the Court in *Joan Chebichii Sawe v R (Nairobi Crim. App. No. 3 of 2002)* where the Court of Appeal remarked:

The suspicion may be strong but this is a game with clear and settled rules of engagement. The Prosecution must prove the case against the Accused beyond any reasonable doubt. As this Court made clear....suspicion however strong cannot provide a basis for inferring guilt which must be proved by evidence.

41. The question that arises here is whether the totality of the evidence in this case leads to the inescapable conclusion that the Accused Person committed the offence. To do so, the Court must assess all the evidence placed before it being careful only to draw permissible inferences. Permissible inferences are those that are based on fact and not mere speculation. In doing so, I have found it useful to adopt the South African test laid out in *R v Blom 1939 (A)* which suggested two rules of logic in the approach to inferences. The first rule is that the inference sought to be drawn must be consistent with all proven facts. The second rule is that the proven facts must be such that they exclude every other reasonable inference.

42. In the instant case, the available evidence, in my view leads to a permissible inference that it was the Accused Person that caused the death of the Deceased. The available evidence excludes any other inferences. The following factors point to this view.

43. First, there is the undeniable evidence of opportunity. The Prosecution established, and the Accused Persons did not deny that she was in the house with the Deceased around the time that he was found with the stab wounds. The Accused Person suggests that the Deceased must have hurt himself in his drunken stupor. However, in my view, there is no reasonable possibility that theory might be true. I say so for two reasons.

44. First, the Deceased was, upon post mortem examination, found not with one – but two stab wounds: one in the chest and the other one eye. Both stab wounds had the same pattern and both were deeply penetrative. The possibility that the stab wound was accidental – for example caused by the Deceased falling on the knife – is completely excluded. Also excluded by the pattern of the stab wounds is the possibility that the Deceased intentionally stabbed himself.

45. Second, the knife was never found at the scene. If, in fact, the Deceased had wounded himself, the knife would have been easily located at the scene.

46. Third, the post-incident conduct of the Accused Person is inconsistent with innocence. The Accused Person not only fled the scene but never returned. Indeed, she was arrested in her parents' home almost two years later. This behavior is particularly telling if one considers that the Deceased was her husband. One would have expected, notwithstanding the circumstances, for an innocent person to attend the burial or find out how the Deceased was doing, if indeed, the Accused Person did not know he had died as she claimed.

47. Fourth, it is also telling that when the Accused Person allegedly found her husband lying on the ground, her first action was not to look for help to take him to the hospital or otherwise administer first aid. It is quite odd that her first reaction was to walk for 1.5 Kilometres to find the Deceased's mother to tell her to take the Deceased to the hospital.

48. In my view, therefore, this is one case where it can properly be said that the “inculpatory fact is incompatible with the innocence of the Accused, and is incapable of explanation upon any other reasonable hypothesis than that of her guilt.” See *R v Kipkering Arap Koske & Another 16 EACA 135*.

49. All considered, therefore, it is my finding that the Prosecution has proved beyond reasonable doubt all the three elements of murder. Not only was the Deceased killed; he was killed by the Accused Person; and without any lawful justification or excuse. **Consequently, I find the Accused Person guilty in the murder of Daniel Njuguna Mburu contrary to section 203 as read together with section 204 of the Penal Code. I hereby convict her accordingly.**

50. Orders accordingly.

Delivered at Kiambu this 15th day of March, 2018.

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JOEL NGUGI

JUDGE