



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL CASE NO. 24 OF 2008

REPUBLIC

VERSUS

SAMUEL WARUI MWANGI ACCUSED

JUDGMENT

Samuel Warui Mwangi was charged with the offence of murder contrary to **section 203** as read with **section 204** of the **Penal Code, Cap. 63**. The particulars of the charge or information are that on the 13th day of April, 2008 at Mungetho village in Murang'a South District within Central Province, he murdered Mary Njoki Kihara.

He pleaded not guilty to the charge and so his trial commenced in earnest on 3rd June, 2008.

The state called seven witnesses two of whom are said to have been eyewitnesses to the murder. Hiram Murigi Mwangi (PW1) who was one of these witnesses testified that he was in the deceased's house on 13th April, 2008 at about 11.45 AM when the accused burst in, picked a fork or hoe and hit the deceased with it.

After assaulting the deceased, the accused person went after him(PW1) and Daniel Mwangi Kinyanjui(PW3) whom he alleged was with him in the deceased's farm where, so he testified, they had been working together with the deceased before the accused struck.

They ran to Kinyanjui's (PW3's) house which was about 100metres from the deceased's house; the deceased managed to pick herself up and followed them to this house as the accused pursued them further. They screamed for help; members of the public, some who in a nearby church responded and managed to subdue the accused. One particular person whom is said to have wrestled the appellant down was Joseph Kamau Kinyanjui. In the meantime, the deceased was taken to hospital in a vehicle belonging Joseph Kamande Ngugi (PW4).

The police arrived later in the day and rearrested the arrested; they also took with them the murder weapon and the cap the accused is said to have been wearing. The witness identified both of these items in court.

On cross-examination the witness testified that the deceased, himself and Daniel Mwangi Kinyanjui(PW3) were all working in the farm and it is only after the accused broke the door to the deceased's house that the deceased left them and went back to the house where she confronted the accused. He also testified that the deceased collapsed outside Kinyanjui's (PW3's) house.

It was his evidence that the deceased was a single mother of one child though she lived with two other children whom her deceased husband had had in a different relationship. None of these children was present when the incident happened. The witness also testified that the accused was not a stranger to him and had known him two years before the incident.

Daniel Mwangi Kinyanjui (PW3) testified that on the material date and time, he was in the deceased farm cultivating it together with Mwangi (PW1) and the deceased. According to him, the accused broke the deceased's house's door; the house was about 50 meters from where they were cultivating. The deceased went to find out what could have happened but she never came back. Instead this witness and Mwangi (PW1) heard her screaming. As they moved towards the house, the accused and the deceased are said to have been coming to where they were in the farm. The accused was armed with a jembe while the deceased was bleeding from her head. It was this witness' evidence that the deceased collapsed outside her house.

He testified further that he and Mwangi (PW1) proceeded home but then the deceased and the accused followed them. With the help of other people whom he identified as Macharia, Ndereva and Mwanja they carried the deceased to a bus stage. It is from there that **Joseph Kamande Ngugi (PW4)** picked them and went to Makuyu police station before they proceeded to Thika Hospital.

The witness reiterated in his answers during cross-examination that they were all on the deceased's farm when the accused person arrived. But the accused and the deceased followed them as they fled back to their houses. According to this witness, the deceased collapsed outside

their house. The accused, on the other hand, came and slept next to the deceased. He testified also that the accused and the deceased had an affair.

Joseph Kamande Ngugi (PW4) testified that on the 13th April, 2008 at about 11.45, apparently in the morning, he was driving in his car when he was stopped by members of the public at Mugetho trading centre to take the deceased to hospital. He rushed the deceased to hospital in the company of Hiram Murigi Mwangi (PW1) and Daniel Mwangi Kinyanjui (PW3); they, however, went to Makuyu police station first before going to the hospital. Unfortunately, the deceased was pronounced dead on arrival.

The post-mortem on the deceased's body was conducted by Dr Joseph Njoroge Silas (PW7), a surgeon who was then based at Nyeri General Provincial Hospital. In his report, he observed that the deceased had a cut wound, about 5 cm in size, on the occipital region of the head. The margins of the wound were ragged. There was a compound skull fracture segment approximately 4 cm in size on the occipital region. There was also a lineal fracture extending 5cm from the depressed segment. Brain material was oozing from the depressed segment. In the doctor's opinion, the deceased died of severe head injury due to sharp trauma to the head.

Senior Superintendent of Police Simon Oloo (PW6) investigated the deceased's murder. He testified that on 13th April, 2008 at about 2.00PM the deceased was brought to Makuyu police station by Joseph Kamande(PW4) and another man. Kamande (PW4), in particular, made a report of assault of the deceased. The deceased herself could not talk because she was unconscious. According to the police officer, she was bleeding from the head; he referred her for treatment. He visited the scene of crime shortly thereafter together with two other police constables whom he identified as Samuel Kariuki and Wangura.

The officer found the accused at the scene; he had been arrested by members of the public. At the time of his arrest, the accused's shirt was stained with blood. He also went to the deceased's house; he noticed blood drops two metres from the house. The officer recovered a hoe from the scene; it was his evidence that the hoe was lying next to the accused person.

The officer rearrested the accused person and subsequently had him charged with murder.

In answer to questions put to him during cross-examination, he told the court that he was informed that the deceased had been working with one Njoki who subsequently ran away and could not be traced, apparently, to testify. He testified further that the accused was arrested next to a homestead but could not confirm whose homestead it was and could also not confirm whether it was the homestead from which the deceased's body had been picked. Similarly, he could not confirm whether the deceased was removed from the same place that the accused was arrested from.

The accused opted to give sworn testimony when he was put on his defence. He admitted that he was at the scene of crime together with Hiram Murigi Mwangi (PW1) and Daniel Mwangi Kinyanjui (PW3) on the 13th April, 2008. It was his evidence that he had been drinking before he proceeded to the deceased's home; he regarded the deceased as his girlfriend. He found Mwangi (PW1) and Kinyanjui (PW3) in the deceased's house. The two men were armed with hoes. The deceased, according to him, was quarrelling with Mwangi (PW1). Mwangi (PW1) then hit the deceased with the hoe. She fell down outside her house. As he tried to assist her Mwangi (PW1) and Kinyanjui (PW3) ran away to the latter's house which was about 500 metres away. He admitted that he pursued them and that when he approached them they started screaming and it is then that he was arrested by members of the public. Despite the injury she sustained the deceased is also said to have followed Mwangi (PW1) and Kinyanjui (PW3). He was arrested while he was with the deceased and the two other men. The accused admitted that the blood stains on his shirt and cap were the deceased's blood. He, however, denied murdering the deceased.

In order to establish whether the offence of murder was committed and whether the accused was the person responsible, the entire evidence on record has to be considered from the perspective of the law that defines this offence. Going back to the charge, the accused was charged under section 203 as read with section 204 of the Penal Code.

Section 203 of the **Penal Code** defines the offence of murder and its punishment is prescribed in **section 204** thereof. The two provisions state 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.

204. Punishment of murder

Any person convicted of murder shall be sentenced to death

It is apparent from section 203 of the Penal Code that in order to sustain a case for murder it is incumbent upon the prosecution to prove that the unlawful death of the victim was caused by an act or omission of the accused and, secondly, the accused person's act or omission was premeditated or, in other words, the accused had malice aforethought. Malice aforethought is the *mens rea* or the mental element for the offence of murder and it may be express or implied. (See **Woolmington v DPP [1935] AC 462**). It is express when it is proved that there was an intention to kill unlawfully (see **Beckford v R [1988] AC 130**), and it is implied whenever it is established that there was an intention to unlawfully cause grievous bodily harm (see **DPP v Smith [1961] AC 290**). Intent is a common element in either of the two forms.

Besides this common law position on malice aforethought, there is a statutory angle to it because **Section 206** of the **Penal Code** goes further to prescribe circumstances under which this mental element is deemed to be proved; it provides as follows:

206. Malice aforethought

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 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 not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused 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.

There is sufficient evidence on record that the deceased's death was not natural but was as a result of an unlawful act. To begin with, Mwangi (PW1) and Kinyanjui (PW3) were in agreement that the deceased was hit with a hoe on the head. The accused himself attested to this fact that indeed the deceased sustained a blow, which turned out to be fatal, on the head. Their evidence in this regard was corroborated by the pathologist's testimony and post-mortem report to the effect that he not only certified the deceased's death but also that the cause of her death was 'severe injury due to trauma on the head'. The death of the deceased and the cause of death were thus proved beyond all reasonable doubt.

The lingering question that this honourable court is now concerned with is whether the deceased's murder was perpetrated by the accused and whether in doing so, he had malice aforethought or the requisite mental element.

If the evidence of Mwangi (PW1), Kinyanjui (PW3) and the accused person himself is anything to go by, there is no doubt that the deceased was murdered in broad daylight. The two prosecution witnesses were both in agreement that she was assaulted towards the end of the morning of the 13th day of April, 2008; they testified that the incident occurred at about 11.45 AM. The accused on the other hand did not attach any particular time when the deceased was assaulted but he agreed with Mwangi (PW1) and Kinyanjui (PW2) that it was on 13th April, 2008 and it was committed in his presence and in the presence of the two prosecution witnesses. There is no doubt therefore that the deceased must have sustained the fatal blow at or about 11.45 AM.

As to who inflicted the fatal blow, the evidence of Mwangi (PW1) and Kinyanjui (PW3) is crucial in determination of this question. According to these prosecution witnesses the accused was the culprit. As far as the evidence of Mwangi (PW1) is concerned, the three of them, that is, himself, the deceased and Kinyanjui (PW3) were in the deceased's farm working when the accused broke into the deceased's house. The deceased left and went to confront the accused seeking to know why he had broken the door to her house; it is during this confrontation that the accused struck the deceased with a hoe.

Kinyanjui (PW3) corroborated Mwangi's (PW1's) testimony and testified further that the distance between the place where they were working in the deceased's farm and the deceased's house was about 50 metres. They heard the deceased scream soon after she went to house. As they went to the deceased's house, apparently in response to her screams, they came face to face with the accused and the deceased who was then bleeding from the head. The accused was armed with a hoe. The deceased according to him, collapsed outside her house but somehow managed to pick herself up and followed them to Kinyanjui's (PW3's) house as they attempted to escape from the accused who threatened to harm them as well. Despite her injury, the deceased managed to reach outside Kinyanjui's (PW3's) house where she collapsed again, this time round never to rise again.

Although I did not have opportunity to hear and see the first six prosecution witnesses and in particular, the first and the third witnesses, I have not found anything in their evidence that suggests that they were neither untruthful nor credible. They were both consistent that the accused person hit the deceased with a hoe and pursued them with menaces to Kinyanjui's (PW3's) house. The accused was finally subdued by members of the public one of whom is said to have been one Joseph Kamau Kinyanjui. As he was grounded, Mwangi (PW1) kept guard so that he could not escape while Kinyanjui (PW3) helped take the deceased to hospital. In these circumstances, I am satisfied that the accused is the person who hit the deceased and fatally wounded her.

Of course it would have been useful to hear from Joseph Kamau Kinyanjui on the accused person's arrest and perhaps it is for this reason that the investigations officer (PW6) testified he would have taken his statement were it not for the fact that he did not find him at the scene when he rearrested the accused. In my humble view, Kinyanjui's testimony would have shed more light on the circumstances under which the appellant was arrested but lack of that testimony is not fatal to the prosecution case.

In his defence, the accused said that he had been drinking immediately before he went to the deceased's home and that soon after he arrived there, Mwangi (PW1) picked a hoe and hit the deceased with it. It was his evidence that the two had been quarrelling. My understanding of the accused's person's defence is that though he denied having inflicted the fatal blow, the court should hold that he was intoxicated if it was to find him to have been the person who fatally wounded the deceased.

Looking at the accused person's defence critically, I am inclined to conclude that it cannot have been a coincidence that the accused walked into the deceased house after a drinking spree; found the deceased quarrelling with Mwangi and soon after his arrival Mwangi hit the deceased with a hoe. In other words, the accused's defence does not create any reasonable doubt in my mind that it is more probable than not that the deceased was hit by Mwangi (PW1) and not the accused person. On the contrary, I find and hold that the state established beyond any reasonable doubt that the accused person fatally wounded the deceased.

What was the motive behind the accused's actions? The reason why the deceased assaulted the deceased is not expressly stated in evidence. All I got from the accused person's evidence as far as his relationship with the deceased is concerned is that the deceased was his 'girlfriend'.

Kinyanjui (PW3), on the other hand, was categorical that the accused had ‘an affair’ with the deceased.

The accused cannot be said to be less culpable because the motive behind his macabre act is not express; as noted earlier, malice aforethought need not always be express. It can be implied if it is clear from the evidence that there was an intention to cause the death of or to do grievous harm to a person, irrespective of whether that person is the person actually killed or not; or that the accused person knows 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 and the accused is reckless whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused; or an intention to commit a felony (see section 206 (a),(b) and (c) of the Penal Code).

The implied malice of the accused which informed his actions, in my humble view, falls into any of these categories; he cannot have struck the deceased if it was not his intention to cause her death or to do her grievous harm. He must also have known that his action in wounding the deceased could probably cause the deceased’s death and if not, he was reckless whether his action would cause death or grievous bodily harm.

I am minded that the accused was certified by a Psychiatrist, Dr. Samuel Owino (PW2) to be mentally fit and capable of standing trial. There was no evidence that he had a history of mental illness or was incapable of appreciating the nature of his actions or the natural consequences that would ensue from such actions at the time he committed the offence.

In the final analysis, I am persuaded to find that the prosecution has proved its case against the accused person beyond any reasonable doubt; accordingly, I hold the accused to have committed the offence of murder contrary to section 203 of the Penal Code; he is convicted accordingly.

Dated, signed and delivered in open court this 20th April, 2018

Ngaah Jairus

JUDGE