



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT VOI**

**CRIMINAL CASE NO 4 OF 2014**

**REPUBLIC**

**VERSUS**

**GABRIEL KENGO NDAIKWA**

**JUDGMENT**

**INTRODUCTION**

1. The Accused person herein, Gabriel Kengo Ndaikwa, was charged with murder contrary to Section 203 as read with Section 204 of the Penal Code Cap 63 (Laws of Kenya). The particulars of the charge were that on diverse dates between 21<sup>st</sup> August and 27<sup>th</sup> August 2014 at Ndara Ranch within Taita Taveta County, he murdered Grace Nyamvula Mwanjala (hereinafter referred to as “the deceased”).
2. This matter was partly heard by Kasango J. She took the evidence of Steven Wanjala (hereinafter referred to as “PW 1”), Livingstone Nyambu (hereinafter referred to as “PW 2”) and Janet Mbiti Kachiri (hereinafter referred to as “PW 3”). When the matter came up 8<sup>th</sup> March 2016, counsel for the Accused and counsel for the State confirmed that this court could proceed from where the same had reached.
3. After considering the evidence and his and the Prosecution’s Written Submissions on the question of whether or not he had a case to answer, on 15<sup>th</sup> December 2016, this court found that a *prima facie* case had been established against him and put on his defence. His case was heard on 2<sup>nd</sup> May 2017.

**THE PROSECUTION’S CASE**

4. The Prosecution called a total of eight (8) witnesses to demonstrate the following ingredients of murder outlined in Section 203 of the Penal Code:-
  1. **Proof of the fact and cause of death of the deceased;**
  2. **Proof that the deceased met his death as the result of an unlawful act or omission on the part of the Accused persons; and**
  3. **Proof that the said unlawful act or omission was committed with malice aforethought.**
5. The Accused person and the deceased had a troubled marriage. They accused each other of infidelity and fought often. They were asked to leave the church they used to attend when the Pastor was completely unable to solve their differences.
6. The Prosecution’s case was that on 21<sup>st</sup> August 2014, the Accused person and the deceased were to travel to Buguta to visit his relatives and that they quarreled over a knife before they left. The deceased never returned to their home and was reported as a missing person on 25<sup>th</sup> August 2014.
7. The Postmortem examination showed that the deceased had an injury at the back of her head that had been caused by a blunt object which was indicative of the fact that she did not die a natural death.
8. The Prosecution was categorical that the Accused person’s alibi defence that was given on oath was an afterthought as he never adduced any evidence to prove that he was away in Kwale from the time the deceased went missing until the time her body was found in a thicket in Buguta, partly eaten by wild animals.
9. It added that the Accused person’s implication of the deceased’s former husband in her death was not true and that he had not demonstrated that there was any existing grudge between him and any of the Prosecution witnesses. It therefore submitted that the Accused

person was guilty of the deceased's death and he should be convicted accordingly.

### **THE ACCUSED PERSON'S CASE**

10. According to the Accused person, on the material of 21<sup>st</sup> August 2014, the Accused person travelled to his home Lunga Lunga in Kwale County where he hailed from. He denied having spoken to PW2 while he was in Lunga Lunga and was emphatic that the deceased was to go to fetch firewood at a place called Msinga in Voi but he did not know where she went to.

11. He said that they had normal marital disagreements and that although the deceased's father had tried to reconcile them, on 21<sup>st</sup> August 2014, he decided to leave their matrimonial home amicably for Lunga Lunga never to return to Voi.

12. He produced in evidence a receipt to show that he had travelled to Lunga Lunga on the material date and contended that the deceased's former husband had threatened him. He never called any witness to support his defence of alibi.

### **LEGAL ANALYSIS**

13. PW 1 was the deceased's son. His evidence was that when he visited the deceased on the morning of 21<sup>st</sup> August 2014, he found Accused person and the deceased preparing to travel to Buguta, where the Accused person hailed from. He testified that at the time he left them, they were not quarreling.

14. On 22<sup>nd</sup> August 2014, he sent his wife to check whether the deceased had returned home but she had not done so. He went to the deceased's house on the evening of 24<sup>th</sup> August 2014 and the Accused person, who was alone, found him there. He was alone. When he asked him where the deceased was, the Accused person told him that they parted ways at Maungu from Buguta after she told him that she was going to Kwale to check on her children from another marriage.

15. He said that he called a relative of his step-father who was residing in Kwale but she told him that the deceased had not reached there. When he went back to the deceased's house on 25<sup>th</sup> August 2014, he found his brother Ali, born from another marriage, but the Accused person was not there.

16. Together with Naomi Mbeyu Mwamlongo (hereinafter referred to as "PW 4"), they went and reported the matter at the Voi Police Station. He said that he went to the deceased's house several times after that but he never found the Accused person.

17. After a search, the deceased's body was found in a thicket in the National Park on 28<sup>th</sup> August 2014. He went to the scene on 29<sup>th</sup> August 2014 when he identified the deceased's decomposing body. He stated that the Accused person never attended the funeral meetings or her burial.

18. PW 2 testified that the deceased and the Accused person used to fellowship in his church known as "The Kingdom Church" from January 2014 to May 2014. They had several arguments leading to their excommunication from the church.

19. His evidence was that on 26<sup>th</sup> August 2014, a person who later introduced himself as the Accused person called and asked him whether he had seen the deceased. He asked him why he was asking him yet they had left together. Apparently, he had been informed of this fact by PW 4. Apparently, PW 4 had told him that the Accused person had gone with the deceased to his home in Buguta.

20. The Accused person then disconnected the call but called him again and asked him not to divulge the information that he was going to tell him. He then told PW 2 that the deceased had been killed by her first husband at Ndara. On asking him to report the matter to the police, the Accused person told him that he was afraid of being suspected of having killed her because they had left together. The Accused person then switched off his phone.

21. PW2 was part of the group that went to Ndara Ranch after a herder had discovered the deceased's decomposing and partly eaten body.

22. PW 3 was the deceased's cousin. She testified that on 2<sup>nd</sup> August 2014, the deceased went to her house at about 2.00 am after she had disagreed with the Accused person. The following day, they went and took her clothes. However, the Accused person kept on coming to her place to plead with the deceased to return home which she did on 7<sup>th</sup> August 2014.

23. She was emphatic that the Accused person killed the deceased because he was very possessive of her and that he not only disappeared but that he also knew where her body was.

24. PW 4 was the landlord to the Accused person and the deceased. She testified that on 21<sup>st</sup> August 2014, the deceased whom they used to stay within the same compound, came to her home at about 7.00 am and requested her that they go fetch firewood at Msinga but she declined. The deceased went alone and came back at 11.00 am and told her that she was leaving with the Accused person for Buguta, the Accused person's place, and that they would be back that Friday.

25 She stated that the deceased never returned home on Friday 22<sup>nd</sup> August 2014 but that the Accused person returned alone on Sunday 24<sup>th</sup> August 2014. When she enquired from him where the deceased was, he told her that they parted ways at Maungu on 24<sup>th</sup> August 2014 as she travelled to Kwale to see her other children who use to live there.

26. Fedis Kabeyu Mwanjala (hereinafter referred to as “PW 5”) was the deceased’s elder sister. She identified the deceased’s body at the mortuary, through her hair and nails.

27. No 93081 PC Shem Asher (hereinafter referred to as “PW 6”) was the Scenes of Crime Officer. He adduced in evidence photos showing the decomposed body of a female that had partially been eaten by wild animals. He explained that the said photographs were not clear as the shots were taken at night.

28. Dr Kagona Gitau (hereinafter referred to as “PW 7”) adduced the Postmortem Report on behalf of Dr Mustafa who conducted the Postmortem on the deceased’s body. He testified that the cause of the deceased’s death was due to cardiopulmonary arrest secondary to unknown cause as the body was in a decomposed state.

29. No 65939 PC Isaac Chebii (hereinafter referred to as “PW 8”) was the Investigating Officer. He reiterated the evidence that had been adduced by the other Prosecution witnesses. He testified that he charged the Accused person because he was the last person to have been seen with the deceased, he came back alone, he asked PW 4 whether the deceased had come back, he was unable to explain where the deceased was and that he was arrested at Lunga Lunga in Kwale County.

30. In his sworn evidence, the Accused person denied having killed the deceased and explained that the deceased refused to get married to him as she had been previously married to five (5) different men. He pointed an accusing finger at the deceased’s former husband who he said visited their home and cursed him that he would never get a child with the deceased.

31. He was categorical that he left the deceased on 21<sup>st</sup> August 2014, the day he separated from her and went to live at Lunga Lunga in Kwale County. He adduced in evidence a receipt that showed that he travelled to Mombasa on 21<sup>st</sup> August 2014.

32. The offence of murder is defined as follows by section 203 of the Penal Code:-

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

33. This definition gives rise to four (4) crucial ingredients of the offence of murder all four of which the prosecution must prove beyond a reasonable doubt in order to prove the charge. These are:

**i. The fact of the death of the deceased.**

**ii. The cause of such death.**

**iii. Proof that the deceased met his death as a result of an unlawful act or omission on the part of the Accused persons,**

**iv. Proof that said unlawful act or omission was committed with malice aforethought.**

34. Malice aforethought is defined in Section 206 as follows:-

**“Malice aforethought shall be deemed to be established by evidence proving anyone 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 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 act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony”.**

35. In the case of Libambula vs Republic (2003) KLR 683, the Court of Appeal stated:-

**“We may pose, what is the relevance of motive here? Motive is that which makes a man do a particular act in a particular way. A motive exists for every voluntary act and is often proved by the conduct of a person. See Section 8 of Evidence Act Cap 80 Laws of Kenya.**

**Motive becomes an important element in the chain of presumptive proof and where the case rests on purely circumstantial evidence. Motive of course, may be drawn from the facts, though proof if it is not essential to prove a crime.”**

36. The Accused person further relied in the case of Erick Odhiambo Okumu vs Republic [2015] eKLR where guided by the holdings in the case of Abanga alias Onyango vs Republic Cr App No 32 of 1990, the Court of Appeal stated as follows:-

**“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 definite tendency unerringly pointing towards guilt of the accused; (iii) the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the Accused and none else.”**

37. To prove a case based on circumstantial evidence, the Prosecution was therefore required to satisfy the test that a negative inference against the Accused person as was set out in the case of **Musoke vs R (1958) EA 175** where the court cited with the approval the decision in **Teper vs R (1952) ALL 480** where it was held as follows:-

**“It is also necessary before drawing the inference of accused’s guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference.”**

38. It was correct as the Accused person submitted that this case was based on circumstantial evidence. Indeed, the fact that the Accused person and deceased had marital problems was not sufficient to have concluded that the Accused person killed the deceased. In addition, it was evident from the charge sheet that the exact date of the deceased’s death was unknown.

39. However, it was evident from the evidence of PW 1 and PW 4 that the Accused person was together with the deceased on 21<sup>st</sup> August 2014; the last time they saw the deceased alive. Both PW 1 and PW 4 also testified that the Accused and the deceased were to travel to Buguta where he hailed from.

40. His defence of alibi that he travelled to Lunga Lunga on 21<sup>st</sup> August 2014 in Kwale County appeared to this court to have been an afterthought as he never alluded to having travelled to Lunga Lunga in Kwale County throughout the trial when he cross-examined the Prosecution witnesses.

41. Despite this court having granted him time on 2<sup>nd</sup> May 2017 to call a witness to corroborate his evidence, on 12<sup>th</sup> October 2017, he informed his witness as he had passed away. However, he never adduced in evidence, any documentary proof to show that his witness could not come to court to corroborate his case because he was now deceased. His alibi defence therefore fell by the wayside.

42. Weighed against the evidence that was adduced by the Prosecution witnesses, the Accused person’s evidence was displaced. He was the one who was last seen with the deceased on 21<sup>st</sup> August 2014. When he returned home alone on 24<sup>th</sup> August 2014 when he returned home, he asked PW 4 whether the deceased had returned home yet he was the same one who informed her and PW 1 on his return home that he had parted ways with the deceased at Maungu as she went to Kwale County to check on her other children, he never participated in searching for the deceased’s body, after she was reported missing, he never attended the funeral meetings or attended her funeral, he disappeared after the deceased went missing and he was arrested in Lunga Lunga Kwale County, three (3) weeks after the deceased had gone missing.

43. His shifting blame to the deceased’s previous husband was neither here nor there as his assertions in this regard were unsubstantiated. It was clear from his evidence that his marriage to the deceased had irretrievably broken down as at 21<sup>st</sup> August 2014, the same day he was said to have left with the deceased, the same date he was last seen with the deceased.

44. The deterioration of their marriage was further confirmed by PW 3 who testified that the deceased went to her house on 2<sup>nd</sup> August 2014 at 2.00 am following a fight with the deceased. The strained relationship between the Accused person and the deceased was also corroborated by PW 2 and PW 4 who spoke of a strained relationship between them.

45. The fact that the Accused person called PW 2 and alluded to the deceased’s former husband as having killed her and that her body was at Ndara was telling and pointed to guilt on his part because he said these words before the body was recovered in a thicket in Ndara on 27<sup>th</sup> August 2014. Further, he was the only person who would have known that the deceased’s body was at Ndara the same place he told PW 2 she was killed. The burden of proof had therefore shifted upon the Accused person in line with Section 111 (1) of the Evidence Act Cap 80 Laws of Kenya because he was the only one who seized of the aforesaid information.

46. Section 111(1) of the Evidence Act provides as follows:-

**“When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him:**

**Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution, whether in cross-examination or otherwise, that such circumstances or facts exist:**

**Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defense creates a reasonable doubt as to the guilt of the accused person in respect of that offence...”**

47. Accordingly, having considered the evidence that was adduced by the Prosecution and by the Accused person, it was the finding of this court that although PW 7 could not for a fact state the exact cause of the deceased’s death because her body was at advanced state of decomposition, it was clear from his evidence that the deceased died as a result of cardiopulmonary arrest.

48. Appreciably, although the deceased's body had decomposed and had been partly eaten by wild animals, PW 1 and PW 5 were able to identify her as the deceased from the peculiar features of a shorter finger on the right hand. In any event, no person had ever claimed the deceased's body as theirs. In the absence of any evidence to the contrary this court was satisfied that the body that was discovered in the thicket on 27<sup>th</sup> August 2014 was that of the deceased.

49. Bearing in mind the circumstances leading to the deceased's death and the circumstances surrounding the discovery of her body in a thicket in the wilderness coupled by the disappearance of the Accused person immediately after the deceased was reported missing, this court came to the firm conclusion that the Prosecution proved its case to the required standard in criminal case, being proof of the case beyond reasonable doubt by demonstrating that the deceased met her death as a result of unlawful actions or omissions on the part of the Accused person and that the unlawful acts or omissions were committed with malice aforethought on his part.

50. The Accused person did not adduce any oral or documentary evidence or co-existing circumstances that weakened or destroyed the Prosecution's case. In fact, he did not demonstrate that there was any existing grudge between him and the Prosecution witnesses person that would have persuaded this court to conclude that he had been framed for having caused the deceased's death.

#### **DISPOSITION**

51. For the foregoing reasons, the Accused person is hereby found guilty of the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code and this court hereby convict him accordingly.

52. It is so ordered.

**DATED at NAIROBI this 25<sup>th</sup> day of May 2018**

**J. KAMAU**

**JUDGE**

**READ, DELIVERED and SIGNED at VOI this 30<sup>th</sup> May of 2018**

**F. AMIN**

**JUDGE**

In the presence of:-

Mr Mwinzi holding brief Mrs Isika for Accused

Miss Anyumba for State

Josephat Mavu– Court Clerk