



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NANYUKI

CRIMINAL CASE NO.7 OF 2015

REPUBLIC.....PROSECUTOR

VERSUS

JOHN MAINA WANGARI..... ACCUSED

JUDGMENT

1. The deceased **C M K** was found dead in the early hours of **11th October 2015**, at **Likii 'B'** in the Likii River, in **Nanyuki Town Laikipia County**. She had been murdered between the **10th and 11th October 2015**. According to **David Kyalo** the investigating officer of this case, the deceased was killed elsewhere and her body was placed in the Likii River after death. This he deduced from the fact that there were no signs of struggle where the body was found. He photographed the deceased's body which shows the deceased was having a red blouse and her jean trouser was pulled downwards revealing that she had no underwear and which exposed her genitalia area.
2. The post mortem examination revealed that the deceased died of asphyxia which was due to strangulation.
3. **John Maina Wangare** the accused was charged with the murder of the deceased person. The accused and the deceased were living together as husband and wife. That fact was indeed confirmed by 9 prosecution witnesses who testified in this case. They had been friends and living together from **December 2014**.
4. The deceased worked as a bar maid at a bar called **Tour Guide**. That bar was owned by **Peter Wanjohi Mwangi**, PW3. The routine of the accused and the deceased was that the deceased would report at the **Tour Guide Bar** and at sometime in the evening the accused would bring to the deceased coffee in a thermos. That was the case on the fateful night of **10th October 2015**. On that evening, between 8 and 8.30 pm the accused went to the deceased's work place to take her coffee in a thermos. The accused found many customers in that bar. After greeting her and finding out about her well being the accused left the bar at 9.30 pm. He said he left because there were many people in the bar. The accused informed the deceased that he was going to **Nyakio Bar**. The deceased stated to him that she would call him using a borrowed phone to inform the accused when she would be ready to go home. **Wanjohi** the owner of **Tour Guide Bar** and the accused confirmed in their evidence that the accused would always pick the deceased when the bar was closed and they would proceed home together.
5. The accused in evidence stated that the deceased did not call him that evening. After a fruitless search for her in **Nanyuki** town he stated that he went home and slept. The accused stated that before leaving

Nanyuki town he inquired from the watchmen near the **Tour Guide Bar** who informed him that the deceased had left in the company of three other people. It is also important to state that the accused before proceeding to their home, passed by the Nanyuki police station to inquire whether the deceased had been arrested, as had happened before. He was informed that she had not been arrested.

6. **Wanjohi** the owner of the **Tour Guide Bar** stated that he had employed the deceased as a bar attendant. He stated that the accused would always arrive at the bar at 8pm and would later proceed home with the deceased once the bar was closed between 10 and 11pm. **Wanjohi** stated that on the fateful night he was not in **Nanyuki** but was in **Nairobi**. After finding out of the murder of the deceased, he stated that he made inquiry from the watchmen of the landlord and who informed him that the deceased on the night in question after closing the bar left the bar in the company of three other people. He further stated that on closing the bar, he ordinarily would take the earnings of the bar but on this occasion he stated that he was in **Nairobi**.

7. The investigating officer informed the court that he arrested and charged the accused because he was unable to give satisfactory answers when questioned about his movements. In other words, the accused was arrested on the basis of suspicion. It is important to state that suspicion cannot infer guilt. This was stated by the Court of Appeal in the case of *Joan Chebichii Sawe vs Republic* [2003] eKLR where the court held:

*“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 in the case of **Mary Wanjiku Gichira vs Republic (Criminal Appeal No. 17 of 1998)** (unreported), suspicion however strong, cannot provide a basis for inferring guilt which must be proved by evidence. We disagree with the learned judge’s view that the prosecution had proved its case against the appellant beyond any reasonable doubt.”*

8. The suspicion spoken about by the investigating officer was due to the accused failure to present himself at the police station when requested by the deceased’s father. But that failure, in my view, is well explained by the accused who said that on informing the deceased’s family members that the deceased’s body was found in Likii river and on meeting the deceased’s father, the accused was informed by that father that it was he who knew about the killing of the deceased. Further on meeting with the deceased’s former boyfriend known by the nick name **MC**, the accused was violently blamed by **MC** of being responsible for the death of the deceased. It was that blame by those persons which led the accused to fear that he would be blamed for the deceased’s death.

9. There is no evidence presented by the prosecution that the accused ran away after the discovery of the deceased’s body. Indeed, his landlord testified how when the accused heard that the deceased’s body was discovered at Likii river, which was near his residence, he fainted in shock. Further the accused stayed within the Nanyuki town meeting up with the deceased father and the deceased employer and **MC**. In his evidence which was not contradicted he decided to go to his upcountry home on **12th October 2015**.

10. As it becomes clear the prosecution did not adduce evidence of who killed the deceased. What the prosecution relied upon is circumstantial evidence which evidence does not irresistibly point to the accused to the exclusion of others as having committed the offence. This was stated in the case **R vs Kipkering Arap Koskei & another 16 EACA 135** where the court held:

“In order to justify the influence of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt.”

11. In this case, the facts are compatible with the innocence of the accused. This is because the bar owner stated that he questioned the watchmen who guarded the building where his bar was and was informed by them that deceased left the bar in the company of three people. It would seem that the deceased left with those three unidentified people, having the bar’s earnings of that night. In all probability therein lies a motive for a killing and the accused does not feature in that motive. Indeed no motive was shown by the

prosecution in respect of the accused. The deceased family members and her employer and also the landlord of their residence all confirmed that the accused was having a harmonious relationship with the deceased.

12. The prosecution failed to adduce evidence capable of leading to a conviction of the accused of murder. Prosecution needed to have summoned the watchmen who were present and near the bar on the night in question. The prosecution even failed to call witnesses of those who operated businesses in the adjacent building. It is not clear why those very vital witnesses did not testify.

13. I need to state that I observed the accused give his sworn defence and I observed the demeanor of his brother who testified and stated that the accused went to their rural home and remained there until his arrest. The accused was in my view, a credible witness. He answered questions put to him without hesitation and his evidence was consistent. He did not even shy away from admitting that he left notes that he had written to the deceased's parents and one to the deceased herself. The note to the deceased he left at the tomb stone. The content of those notes did not at all reveal a guilty mind. They were notes that were written by someone who cared for the deceased. Those notes did not have a negative impact on the accused's credibility.

14. It is because of the above finding, that I hold that the prosecution failed to meet its burden of proof. The evidence adduced was not sufficient to support the charge of murder contrary to Section 203 of the Penal Code. The evidence fell short of proving that it was the accused who caused the unlawful injury to the deceased which led to her death.

15. I accordingly **acquit John Maina Wangare** of the charge of murder. I order that he be set free unless he is otherwise lawfully held.

DATED AND DELIVERED THIS 28TH DAY OF SEPTEMBER, 2018.

MARY KASANGO

JUDGE

CORAM

Before Justice Mary Kasango

Court Assistant :Mariastella

Accused: John MainaWangari

For Accused.....

For State:.....

COURT: Judgment delivered in open court.

MARY KASANGO

JUDGE