



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL CASE NUMBER 11 OF 2015

REPUBLIC.....PROSECUTOR

VERSUS

MARY NJOKI NG'ANG'A.....ACCUSED

JUDGMENT

Mary Njoki Ng'ang'a, referred to as the accused in this judgment, is charged with murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the offence are that on the night of 14th and 15th January 2015 at Marenga Road Kangemi in Nairobi County, jointly with others not before the court, she murdered James Ng'ang'a Ritho, referred to in this judgment as the deceased. The accused denied committing this offence.

Twelve (12) witnesses have testified for the prosecution. From the evidence gathered from these witnesses this court is able to piece together the circumstances that led to the death of the deceased. The evidence shows that the deceased was married to the accused for about thirty (30) years as at the time of his death. Both the deceased and the accused lived together and were the only two people living in their home, a five bedroomed house located at Marenga Road in Kangemi Nairobi. Their son George Ritho Ng'ang'a (PW1) and his wife Jane Wambui Njuguna (PW5) lived a few metres away. On the evening of 14th January 2015 George Ritho arrived home after work, took dinner with his family and decided to go to Shell Petrol Station on Waiyaki Way to close for the day his Matatu business. He passed by his parents' home to see them. He found both at home. The time was about 8.00pm. After staying with them for about 10 minutes he left. He informed his mother, the accused, that he would pass by later that evening to collect milk. This was his daily routine. After closing business he passed by his parents' home again. The time was about 11.00pm. He found his parents' kitchen lights on. He knocked at the kitchen window to alert his mother of his presence. The accused gave him milk and PW1 left.

At around 3.45am that night (now 15th January 2015), PW1 and his wife PW5 were sleeping when a knock at their door awoke them. It was the accused knocking. According to PW1, the accused was crying when he told him that they (accused and deceased) had been attacked by three people who had kidnapped the deceased. PW1 and his wife PW5 went to the home of their parents. They did not find the deceased. The accused told them that one of the attackers had kicked the accused on her chest as she was going up the stairs. PW1 called other relatives including Peter Njenga Ritho (PW4) and George Hiro Ritho (PW7) both brothers to the deceased, among others. They went to the home of the deceased, confirmed the story and went to report to Kabete Police Station at about 5.00am on the 15th January 2015. They were told to return in the morning. They returned at 8.00am in the morning of the same day and made the report. Police took over the matter and investigations commenced.

Police made several visits to the home of the deceased. In the course of one of the visits the police noted blood stains on the compound of the deceased near the gate and in the master bedroom. The master bed had blood splashes, the cabinet and the mosquito net also had blood stains. The police noted that the mattress on the master bed looked new and decided to search for the mattress that may have been on that bed. Jane Wambui (PW5) in company of another relative named as Lucy Nyambura found a bloodstained mattress in another room and showed the police. The police took a piece of that mattress that contained bloodstains. Bloodstains were also found on the foot of the bed after the police moved the bed from its original standing position. The evidence of PC Joseph Gathecha, the scenes of crime officer (PW3) confirms that bloodstains were found in various parts of the bedroom and the compound. He documented this evidence in the photographs he took at the scene.

The whereabouts of the deceased were unknown. Police took about four (4) hours combing the Kabete Campus Coffee Plantation trying to look for the deceased but they were unsuccessful. Police contacted other police stations and hospitals. They also contacted the mortuaries at Nairobi and Thika to no avail. The body of the deceased was found at Lukenya Quarry in Machakos County on the morning of 15th January 2015. Police at Athi River Police Station were informed and IP Lydia Mutinda and PC Daniel Nyariki visited the scene. They confirmed the report and removed the body from the scene to Machakos Level 5 Hospital Mortuary that same morning.

Police at Kabete Police Station were not aware of the recovery of the body until 19th January 2015. Led by SSP Joseph Ondoro (PW9) DCIO Dagoretti, police officers and relatives of the deceased travelled to Machakos Level 5 Hospital Mortuary. They were shown the body of a male African adult. The body was identified by relatives as that of the deceased. PC Joseph Gathecha took photographs of the body at the mortuary in Machakos. The body was moved to Umash Funeral Home in Nairobi where it was examined by Dr. Peter Muriuki Ndegwa

(PW2) on 21st January 2015 after it was identified to him by George Ritho Ng'ang'a and George Hiro Ritho son and brother of the deceased respectively.

After police completed investigations, they concluded that the accused was implicated in the death of her husband and that there was sufficient evidence to support a charge of murder. They charged the accused jointly with others not before the court with murder as shown above. It is now upon this court to make a determination whether the evidence tendered by the prosecution witnesses proves to the required standard a case of murder against the accused person. I have had the opportunity to carefully read and consider all the evidence both by the prosecution witnesses and the defense of the accused person. I have also read and considered the rival submissions.

The accused was the only witness for the defense. In her unsworn evidence the accused denied killing her husband. She narrated to the court the events of 14th and 15th January 2015. Her evidence simply narrates how both the deceased and the accused spent the day on 14th January 2015, attending to chores like making meals, paying bills, attending prayers in church and watching television at home. She confirmed the evidence that their son PW1 visited them that evening before going to his business and after closing business to collect milk on his way home. She narrated that the deceased had gone to bed by the time PW1 returned to collect the milk. She testified that she met a strange man at the stairs of their house with a covered face; that the stranger hit her on the chest and she fell down; that the stranger beat her and she screamed; that the stranger held her and took her to the toilet where he locked her threatening that he would kill both the accused and the deceased; that he left her in the toilet but came back for her and took her to where the deceased was; that she found the deceased bleeding after he had been assaulted; that she screamed again; that the attackers assaulted the accused and the deceased demanding money; that they were taken downstairs and all this time the deceased was bleeding; that there was a vehicle parked outside at the gate; that the accused and the deceased were placed in the boot of that vehicle; that the vehicle stopped at a place called Welcome and the accused was removed from the boot and left there while the deceased was taken away in the vehicle; that she screamed for help and a man came by who escorted her home telling her not to report the matter to the police yet but to wait in case the kidnappers called demanding money and that she returned to her house and went to tell her son PW1. She testified that police later came to her house and found the bloodstains from the deceased's bleeding. She testified that police found a mattress with bloodstains in another room where the deceased had been taken while the attackers were looking for money.

In its submissions the prosecution emphasized on the fact that blood was found inside the bedroom of the deceased and accused and also on the compound and at the gate of their house; that the evidence places the accused at the scene of the murder and that given the beddings and deceased's clothes were found with bloodstains and that there were bloodstains in the bedroom, mattress and in the compound, it shows that the deceased was killed in his house and the body transported to Lukenya Quarry where it was found. The prosecution pointed out that there was no breakage into the house of the accused and the deceased and therefore it cannot be true that strangers gained entry and attacked the couple. The prosecution urged the court to reject the defense of the accused as unfounded and find that the charge of murder had been proved to the required legal standard, to find the accused guilty and convict her for murder.

On the other hand, Mrs. Kinyori for the accused submitted that the prosecution has failed to prove that the deceased met his death as a result of the accused's unlawful act or omission; that anyone could have gained access to the compound of the deceased given that the wall and the gate were not secure and that there were many tenants in that compound who could have organized an attack. It was further submitted that the prosecution has failed to prove *mens rea* on the part of the accused; that there is no eye witness account of the events leading to the death of the deceased and therefore the case for the prosecution is based on circumstantial evidence; that for a conviction to lie based on circumstantial evidence such evidence must satisfy certain principles as stated in *Erick Odhiambo Okumu v. Republic [2015] eKLR* cited in *Abanga alias Onyango v. Republic, Cr. Appeal No. 32 of 1990*. Counsel submitted that "no amount of evidence based on suspicion, no matter how strong the suspicion may be can be treated as credible evidence and that such evidence is worthless in a criminal trial where the threshold for proof is very high" as was held in *Sawe v. Republic (2003) KLR 364*. She submitted that the accused is suspected of having murdered the deceased because of the presence of blood inside and outside the house but the accused has testified that the deceased was bleeding after the attack. She submitted that the prosecution has failed to prove beyond reasonable doubt the case against the accused. Counsel urged the court to find the accused not guilty and acquit her forthwith.

After a careful reading of the evidence on record, it is clear to me that there is no eye witness to the circumstances that led to the death of the deceased. I agree with the defense counsel that the case for the prosecution is based purely on circumstantial evidence and that for a conviction to lie basing the case on circumstantial evidence; such evidence must satisfy certain set principles. These principles have been relied on in many authorities including the authorities cited by the defense counsel and indicated above. In *Neema Mwandoro Ndurya v. R [2008] eKLR*, the Court of Appeal cited with approval the case of *R v Taylor Weaver and Donovan (1928) 21 Cr. App. R 20* where the court stated that: "*Circumstantial evidence is often said to be the best evidence. It is the evidence of surrounding circumstances which by intensified examination is capable of proving a proposition with accuracy of mathematics.*"

While the above may be true, the trial court is required to exercise caution in relying on circumstantial evidence to base a conviction on. This caution is expressed in the case of *Teper v. R [1952] AC at p. 489* in the following terms:

"Circumstantial evidence must always be narrowly examined, if only because evidence of this kind may be fabricated to cast suspicion on another. It is also necessary before drawing the inference of accused's guilt from circumstantial evidence to be sure that there are no co-existing circumstances which could weaken or destroy the inference."

In *R. v. Kipkering Arap Koske & Another [1949] 16 EACA 135*, the Court of Appeal for Eastern Africa held as follows on circumstantial evidence:

"In order to justify the inference 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. The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is on the prosecution, and always remains with the prosecution. It is a burden which never shifts to the party accused."

The same Court expanded the above principle in *Simoni Musoke V. R. [1958] EA 715*, citing with approval the following passage from the

Privy Council decision in the Teper case cited above:

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

Bearing in mind the above authorities I approach this case, which is based on circumstantial evidence, with caution in order to determine whether the evidence against the accused satisfies the principles of circumstantial evidence expounded therein. The prosecution in this case, through circumstantial evidence, must prove beyond reasonable doubt that James Ng’ang’a Ritho, the deceased, ***died due to an unlawful act or omission perpetrated by the accused jointly with others not before the court with malice aforethought*** (emphasis added). These are the central issues that this court is obligated by the law to determine.

That the deceased died is not in dispute. His death is as gruesome as it is shocking. The state of the body of the deceased found at Lukenya Quarry and captured in the photographs produced in evidence in this case is horrifying. After viewing these photographs it becomes clear to my mind that the perpetrators of this heinous act had one intention in their minds; to kill the deceased. To actualize that act, they also tortured the deceased. I cannot think of any other intention on their part after considering the testimony of witnesses and the evidence portrayed in these photographs. The description of the state of the body of the deceased is well captured in the evidence of IP Lydia Mutinda from Athi River Police Station. She vividly describes the state of the body as she and her colleague PC Nyariki found it at Lukenya Quarry as follows:

“On arrival I found 2 big polythene bags and one small paper bag. In the small paper bag were 2 green gloves. Inside the big plastic bags were assorted clothes. The gloves and the clothes were soaked in blood. All these clothes were in the 2 bags apart from this corduroy khaki which was not in the bags but was lying next to them. Inside the bag were 4 shirts, one trouser and pillow case. In the other bag was the body protruding from it. There was also this pillow, one shirt and a kiko. The body was protruding from the bag because it could not fit in the bag. The head was protruding but was covered with this Nakumatt paper bag. On top of the paper bag there was a rope. This is the manila rope. It is a long rope and from the neck it tied the feet together. After removing the polythene bag we saw a deep cut on the head on the right side above the eye. The rest of the body had rope marks because it was very tight and a cut on the left arm.”

SSP Joseph Ondoro had this to say in respect of the state of the body of the deceased as observed in the mortuary at Machakos:

“The body had bruises on the hands. It had been cut on the joints and a very deep concussion at the back of the head. It was still bleeding from the mouth and nose. It had marks all over the body as though he had been tortured. There was a new manila rope tied on the legs, hands and the waist. The body was in a sorry state.”

PC Joseph Gathecha the scenes of crime officer who photographed the body at the mortuary described it as follows:

“I was shown one body of African male adult identified to me as James Ng’ang’a Ritho where I observed that the body had been tied with nylon rope on the legs, the head had multiple injuries. On the neck were multiple injuries around. There were friction marks on both legs which I all documented.”

Indeed the photographs produced in court as Ex. 3 are a true reflection of the evidence from the three officers captured above. The photographs capture the horrific details of the injuries suffered by the deceased and bear true testimony of the macabre nature of his death.

Dr. Peter Muriuki Ndegwa (PW2) found the following injuries after examining the body of the deceased on 21st January 2015:

- (a) Subcutaneous contusion on the right cheek and right eye socket and below the right ear all measuring 10cm in diameter.***
- (b) Subcutaneous contusion on the left eye socket.***
- (c) Circular external bruise on the right side of eye socket 2cm in diameter.***
- (d) Lacerations on the anterior parietal scalp 5cm long and 1cm wide.***
- (e) Subcutaneous contusion on the right upper arm laterally.***
- (f) Horizontal ligature impression along shortest circumference of the neck (Adam’s apple).***
- (g) Bruises on the scalp on parietal area and diffused subdural haematoma.***

The cause of death in the opinion of Dr. Ndegwa was head injury and manual ligature and strangulation due to blunt force trauma.

With the above evidence, it is the finding of this court that there is sufficient evidence on record to prove beyond reasonable doubt that the deceased died. I further find that the death of the deceased resulted from an unlawful act. He was subjected to torture as a result of which he sustained multiple fatal injuries. He was also strangled. As observed by the pathologist a combination of head injury and manual ligature and strangulation caused the death of the deceased. The details of the injuries suffered by the accused are confirmed by the photographs produced in court. These details tell the horrendous story of his death.

Who perpetrated this grisly act? In other words did the accused cause the death of the deceased? In my considered view based on the

evidence on record, it is safe to deduce that the death of the deceased was carried out by more than one person. I say this because based on the evidence one person could not have killed the deceased, tied him up, stuffed the body in bags, carried him downstairs and transported him to Lukenya. On 14th January 2015 after PW1 returned to his house after collecting milk from his parents, the deceased and the accused were left the only two people in the house. The story told by the accused to the relatives of the accused and the deceased including their son PW1 is that they (accused and deceased) were attacked by three people. She also told them that the three attackers had stayed in their (accused and deceased) house for three days before the day of the attack. Throughout the evidence of PW1 (son of the deceased and accused), his wife PW5, PW4 Peter Njenga Ritho and PW7 George Hiro Ritho brothers to deceased, there is no evidence that the accused ever told them that her husband had been injured inside the house by the attackers and that he had bled profusely as she claims in her defence. I have carefully read the evidence of the accused in her defence. I note that she did not mention that the alleged three attackers had stayed in their house for three days. In fact she was not clear in her evidence in defense as to how many attackers there were. She did not state that they were three in number. She only mentioned the attackers in plural without stating their number. Her evidence emphasizes the assault on the deceased and his bleeding profusely after that attack.

It becomes clear from the evidence that the house of the accused and the deceased had not been broken into. Not the main gate to the compound or the door to the house or windows was broken into. Given that there was no breakage into the house, the only way any attacker could have gained entry is by being allowed inside or gaining entry through a key in their possession. The story of the attackers having been inside the house hiding for three days is incredible and does not sell. It is beyond human understanding that three strangers can stay inside the house without detection given that the house was occupied and that the accused and the deceased were mostly indoors. It is no wonder that the accused did not repeat to the court what she had told her relatives about three strangers inside her house for three days before the attacked took place.

Evidence shows that there were bloodstains in the house, particularly on the mosquito net covering the master bed, the cabinet in the master bedroom, on the board of the bed and on the mattress found in a different room. Blood was also found on the foot of the bed where it had stood. This was only visible after the bed was moved from the place it stood. All these places are captured in the photographs. More stains of blood were found on the stones in the compound and at the gate of the compound. Police collected the following items for analysis:

- (a) Scrapings from the bedroom, item 'A';
- (b) Pieces of stones from the compound, item 'B';
- (c) Pieces of wood from the bed, item 'C';
- (d) Blood sample from deceased, item 'D';
- (e) Piece of cloth from the trouser recovered at Lukenya Quarry, item 'E' (i); and
- (f) Piece of cloth from the bed sheet recovered from Lukenya Quarry, item 'E' (ii).

These items were submitted to the Government Chemist Laboratory. They were examined by Lawrence Kinyua Muthuri, a Government Analyst (PW11) to determine the presence and source of any blood stains on them. He found that the scrapings from the bedroom, the stones picked from the compound, the pieces of wood from the bed, the piece of cloth from the trouser and piece of cloth from the bed sheet both found at Lukenya Quarry were all lightly stained with human blood. The blood sample and the stains of blood found in all the above items were profiled for the DNA. The DNA found in the blood stains from all the items listed above matched the DNA in the sample of deceased's blood. In other words, the scrapings from the bedroom, the stones from the compound, the piece of wood from the bed, the piece of cloth from the trouser and from the bed sheet recovered at the scene at Lukenya Quarry were all stained with deceased's blood. With this evidence this court can safely conclude that the deceased was injured and bled in the bedroom and on the compound of their home in Kangemi. There is a high probability that the deceased was killed inside his house and his body tied up and transported in bags to Lukenya Quarry. This is because the assorted clothes found in the two bags, one containing his body and some clothes and the other containing assorted clothes, were all stained with blood. Although the bedroom was neat according to SSP Joseph Ondoro, keen observation by the police led to the discovery of blood stains on the foot of the bed, mosquito net and the bed. It is again probable that the house was cleaned to conceal what had happened in it, but still some traces of blood were left. There is also evidence of IP Lydia Mutinda that the scene at Lukenya Quarry where the body was found was not disturbed and it looked as though the deceased was killed somewhere else and the body dumped there.

I have also taken into consideration the evidence of Zakayo Juma (PW10), a tenant of the deceased and the accused as at 14th January 2015. He testified that on that evening at about 11.00pm he heard a shout and screaming from the direction of the house of the accused and deceased. He went outside his house to find out what the sound was but he did not notice anything. He thought it could have been a domestic misunderstanding and returned to his house to sleep. He was to learn later about the death of the deceased.

As I have stated above, the killing of the deceased was caused by several people. I conclude so because of the nature of that killing. From the evidence on record it is safe to conclude that the deceased was killed inside his house in the bedroom and body tied up and taken downstairs and outside the compound. It is my considered view, based on circumstantial evidence, that the body of the deceased was transported, together with bloodstained shirts (4), trouser, pillow, pillow case and a kikoi, to Lukenya where it was dumped. I believe that in the course of transporting it, some blood stains dropped on the pieces of stones in the compound. It is my considered view that someone must have done some cleaning of the bedroom but forgot to move the bed to clean off some stains of blood at the foot of one of the bed stands and that they also failed to notice that the mosquito net and the wood on the bed had stains of blood.

Can the accused feign ignorance of all these happenings in her house? I do not think so. The accused and the deceased were not the happiest of couples. They experienced domestic disputes. Although the defense counsel submitted that the accused and the deceased did not have domestic disputes, this is not true. This is what their son George Ritho Ng'ang'a told the court in his evidence in chief:

“I lived with my parents before I married. Their relationship was cordial. After I married, I moved out and their relationship changed. They started having differences. When I was around they used to be ok but when I was away their relationship was not so good.”

Of course in cross examination, George was not so categorical about the relationship of his parents, only stating that their relationship was good when he lived with them but he could not tell how they lived after he moved out.

Peter Njenga Ritho one of the brothers of the deceased told the court that he did not know how the accused and the deceased lived and that when he visited them they did not seem to have any issues. However, George Hiro Ritho (PW7), another brother of the deceased, told the court in evidence in chief that ***“I cannot talk of their relationship when they were alone but at times they had domestic quarrels”***. In cross examination on this issue, he told the court that:

“Police did not ask me if deceased and accused used to fight. I did not tell police of domestic quarrels and fights. My evidence is not an afterthought. I witnessed quarrels. We used to live near each other. At one time, the accused poured hot water on the deceased’s back. The matter did not reach the police. I am not aware if it was reported.”

In my view the evidence cited above satisfies me that the accused and the deceased did not have a smooth marital relationship. This could have provided the motive for this murder. I am alive to the fact that motive is not an ingredient of murder but it may be a catalyst that could trigger a human being to commit murder or any other crime.

Another issue that came up in the course of this trial is that of a land dispute. The accused had told the police that the three attackers were accusing her husband of interfering in a succession cause in respect of the estate of the deceased’s father. To Peter Njenga, the accused told him that the three attackers who had been hiding in her house for three days said they were looking for the accused because of a land case. Peter told the court that he was not aware of any land case involving her deceased brother. It is worth noting that in her defense the accused did not mention anything about a land case or succession cause. Instead she told the court that the attackers were demanding money from them.

My careful analysis and consideration of all the evidence leads me to conclude that the accused’s defense is an afterthought and cannot be true. From the information she gave her relatives to that which she told the police and then her evidence in court, what comes out is a jumbled attempt to exonerate herself. I find her evidence in court incredible and unbelievable. I am alive to the fact that the accused has no duty to prove her innocence. The duty to prove a criminal case remains with the prosecution at all times. However, the evidence in the defense of the accused has failed to dislodge the evidence by the prosecution. Her evidence does not create any doubts in my mind that she took part in the death of her husband. I take this view because the accused did not behave like someone who cared much after the alleged kidnap of her husband. She did not go to report to the police immediately the alleged attack occurred given that she told the court that they were attacked at about 11.00pm after their son left their house; there is no evidence of a break in into her house; the evidence that three attackers hid inside their house for three days is incredible and she did not seek help of relatives, specifically her son who lived a few metres away. Her story as to what really happened as told to her relatives, to the police and to the court does not agree and kept on changing.

I reject the defense of the accused. In my considered view, based mostly on circumstantial evidence, the accused participated in the killing of her husband. Under section 20 of the Penal Code when an offence is committed, each of the following persons is deemed to have taken part in committing the offence, and may be charged with actually committing it:

- (a) Every person who actually does the act or makes the omission which constitutes the offence;***
- (b) Every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence;***
- (c) Every person who aids or abets another person in committing the offence;***
- (d) Any person who counsels or procures any other person to commit the offence.***

In the case of counseling or procuring the person may be charged either with committing the offence or with counseling or procuring its commission and a conviction or counseling or procuring the commission of an offence entails the same consequence in all respects as a conviction of committing the offence.

After my careful analysis of all the evidence, it is my considered view that the inculpatory facts in this case are, based on circumstantial evidence, incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of her guilt. I also find no other co-existing circumstances which would weaken or destroy the inference of accused’s guilt. The evidence by the prosecution has not been controverted by the defense. I find sufficient circumstantial evidence to point to the fact that the accused must have played any of the roles stated under section 20 of the Penal Code. She is a principal offender in terms of that section. I believe that she was not alone. I believe that she must have had help from others not before the court. I believe that this is why it was possible for her to remain in the house while the body of her husband was transported to Lukenya. With this finding, I reach a conclusion that the prosecution has proved beyond reasonable doubt the involvement of the accused in the murder of her husband.

The remaining issue to be resolved is whether in committing this offence the accused had malice aforethought. My quick answer to this question is in the positive. I have stated in this judgment the macabre nature of the death of the deceased and the torture he underwent resulting in his death. He was severely injured. He suffered horrific torture and his body tied and stuffed in a bag. As stated above in this judgment, the intention of the accused and the other perpetrators not before the court was to kill the deceased, a feat that they accomplished. My finding on this issue is that the prosecution has proved beyond reasonable doubt the element of malice aforethought on the part of the accused.

Having proved beyond reasonable doubt all the ingredients of murder, the prosecution has discharged its mandate in this case and I so find. Consequently, I find the accused guilty of the murder of James Ng'ang'a Ritho and convict her for murder contrary to section 203 as read with section 204 of the Penal Code. Orders shall issue accordingly.

Delivered, dated and signed this 27th day of September 2018.

S. N. Mutuku

Judge