REPUBLIC OF KENYA

HIGH COURT AT NAIROBI

CRIMINAL CASE NO. 10 OF 2012

LESIIT, J

REPUBLIC……..…PROSECUTOR

VERSUS

PETER KAMAU WARUI…….....ACCUSED

JUDGMENT

1. The accused person PETER KAMAU WARUI is charged with Murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the charge are;

> **"That on the night of the 31st day of January 2012 at Kayu Trading Centre in Gatanga District within Kiambu County murdered JANE NJERI NGANGA."**

2. The trial against the accused started before Ombija, J, as he then was. The judge heard the entire prosecution evidence after which he ruled that the accused had a case to answer. I then took over the case and after invoking **section 201(1)** and **section 200** of the **Criminal Procedure Code**. I heard the defence case and therefore concluded the case.

3. The prosecution called 10 witnesses. The case of the prosecution is quite straight forward. The facts of the case were that the deceased owned a hotel at Kayu Trading Centre. That was where she retired to sleep on the evening of 2nd January 2012, after spending the day with her aged mother, PW2 and her children including PW1. The next morning at 6 a.m., PW1 the son of the deceased went to take breakfast at his mother's hotel as was his custom, before going to school. PW1 found the deceased lying in bed in a pool of blood.

4. PW4 and 7 were among the first group of police officers to get to the murder scene. They concluded that the murderer had an access to the deceased room because there was no sign of break-in. While there the accused was identified to them as the known boyfriend of the deceased. It is the evidence of PW4 and 7 that when they approached the accused, he attempted to run away. He was arrested. Both officers testified that they took the clothing and shoes the accused was wearing because they saw blood stains on them. These were gumboots P. Exh. 1; jacket, P. Exh 2 and trousers, P. Exh. 3. PW10 recovered an iron bar from under the bed of the deceased, which was produced as P. Exh. 8. All these items were taken to the Government Analyst for DNA profiling. PW5, the Government Chemist confirmed that the accused jacket, P. Exh 2 had blood which had the DNA of the deceased. The rest of the items had no blood.

5. PW10 recovered the phone of the deceased from her house, P. Exh 11. He also received the phone recovered from the accused, P. Exh. 4. PW10 called for and received Call Data from Safaricom which

shows that the accused and the deceased communicated 104 times between 1st December and 2nd January, 2012.

6. The cause of the deceased death according to PW8, the Government Pathologist, was severe head injuries due to blunt and sharp forced trauma consistent with assault. He noted five penetrating stab wounds on the upper jaws, forehead, both sides of the cheeks, lacerations on three sides of the head and a depressed skull. These were definitely very severe injuries.

7. The accused was eventually charged for the offence. He put forward an alibi as his defence. He said he was in his house and spent the night there on the night of 2nd and 3rd January 2012. The accused called a witness, DW2, who was his sister-in-law. DW2 corroborated accused alibi saying that she spent the night in accused sitting room, next to his bedroom. DW2 testified that the accused never left the house that night.

8. The accused faces the charge of murder contrary to **section 203** as read with **section 204** of the **Penal Code**. Murder is defined under **section 203** as follows:

> **"203. Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder."**

9. The intention to cause death or grievous harm is malice aforethought and under **section 206** of the **Penal Code** the circumstances which constitute malice aforethought are set out as follows:

> **"206. 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.**

10. I have considered the entire evidence adduced by both sides and the filed submissions by the defence. Even though Ms. Njuguna stated that the State had filed its submissions, I was unable to find any submissions by the State in the file.

11. I will start by mentioning that the date on the information did not receive any support from the prosecution case. The information charges the accused of unlawfully causing the deceased death on the 31st day of January, 2012. All the prosecution witnesses stated that the deceased was discovered dead at 6 am on the 2nd January, 2012 by her son, PW1.

12. The evidence against the accused is circumstantial as there was no eye witness of the offence. The principles which apply to determine whether the evidence of circumstances adduced by the prosecution is sufficient to sustain a conviction are well settled.

13. In the case of **REP V. KIPKERING ARAP KOSKEI & ANOTHER 16 EACA 135,** the Court of Appeal held:

"In order to justify the inference of guilt, the inculputory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt."

14. In **SAWE –V- REP[2003] KLR 354**, the Court of Appeal held as follows:

"1. In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypotheses than that of his guilt.

2. Circumstantial evidence can be a basis of a conviction only if there is no other existing circumstances weakening the chain of circumstances relied on.

3. The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution. This burden always remains with the prosecution and never shifts to the accused.

4. ...

5. ...

6. …

7. Suspicion, however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt."

15. And finally, in order to justify a conviction on the basis of circumstantial evidence, the prosecution must meet the test as was set down in **ABANGA alias ONYANGO V. REP C.A. No.32 of 1990 (UR**) thus:

"It is settled law that when a case rest 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 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"

16. The burden of proof lies with the prosecution to prove the case against the accused beyond any reasonable doubt. The prosecution must adduce evidence to prove that the accused unlawfully attacked the deceased, causing her severe injuries which led to her death. The prosecution must also prove that at the time the accused inflicted the injuries on the deceased, he had formed the intention to either cause death or grievous harm to her.

17. The prosecution relies on the presence of blood on the accused jacket to conclude that the accused was the one who committed this offence. The prosecution also relies on the information received at the scene from members of public that the accused and the deceased were lovers; and that since there was no break-in into the deceased house, the murderer had access to the house, or was well known to the deceased. The prosecution also relies on the Safaricom Data which shows that the accused and the deceased had made 108 calls between them between 1st December, 2011 and 2nd January, 2012.

18. Counsel for the accused submitted that the evidence by the Prosecution witnesses was inconsistent, insufficient and uncorroborated to prove that the accused person really committed the offence. Counsel submitted that it was mere speculation by PW4 and PW7 that the accused was the deceased boyfriend as the same was unsubstantiated by any member of the public as alleged.

19. The evidence of PW4 and 7 was that the accused and deceased were having an affair. Both witnesses testified that they got that information from members of public at the scene of murder. The prosecution did not call any evidence to support the evidence of PW4 and 7 to that effect.

20. The **Evidence Act** under **section 63** provides as follows:

> **"63 (1) Oral evidence must in all cases be direct evidence.**
>
> **(2) For the purposes of subsection (1), "direct evidence" means-**
>
> **(a) with reference to a fact which could be seen, the evidence of a witness who says he saw it;**
>
> **(b) with reference to a fact which could be heard, the evidence of a witness who says he heard it;…"**

21. The prosecution needed to call direct evidence to establish that the accused and the deceased were having an affair. They called none. What that means is that the information that the deceased and accused were lovers is hearsay as the person or persons who gave it to the two officers were not called to substantiate that report. I agree with the defence that that bit of evidence was not substantiated. Consequently the court cannot rely on it.

22. The accused in his defence stated that the deceased was his customer, that he supplied milk and vegetables for her hotel business. He stated that for that reason they communicated often so that he could know what and when to deliver what she required. That statement was not controverted by the prosecution. It is a reasonable explanation for the numerous calls between the two of them during the period, as established by the Safaricom Data.

23. The issue of the blood on the accused jacket. P. Exh. 2 is rather blurred. As I indicated earlier I did not hear the prosecution case. From the record, the police officers PW4 and 7 testified that all the accused clothing was full of blood stains. There was no evidence to show exactly where the blood on each of the pieces of clothing was seen by the police officers, PW4, 7 and 10. Even when the items of clothing were exhibited and produced in court, none of the witnesses drew the courts attention to the blood stains, or to where they had been spotted. The court therefore has no clue where the blood stains had been seen. Further the court has no clue where the blood stains were found by PW5.

24. The defence Counsel submitted that the report from the Government chemist, PW5 contradicted the evidence of PW4 and PW7. Counsel submitted that whereas PW4 and 7 testified that all the accused clothes were full of blood stains, according to PW5 only the jacket was lightly stained with human blood. The gumboots and trouser were not stained with any blood. Counsel submitted that according to his defence the accused was forced to enter the deceased person's house, and at that instance the police took his clothes. Counsel suggested that the police might have done anything to implicate the accused, including soiling the clothes with the deceased blood.

25. It is not in doubt that the Government Chemist found the accused jacket was the only piece of his clothing with human blood. PW5 described the jacket as lightly stained with deceased blood. The rest of the clothing had no blood whatsoever. To that extend I agree with the defence that it does appear that the police were exaggerating when they said that the accused was full of blood stains in all his clothing and shoes. What presents me with a problem is the inability to know exactly where the blood stains were. This is more so in light of the accused defence that the police took him into the deceased house and started beating him, making him touch things in that house and demanding to know exactly how he murdered the

deceased. Given that defence, it was critical to know exactly where the blood stains were found, in order to determine whether what the accused alleged in his defence was reasonable and logical.

26. There was another line of inquiry which exposes just how much the prosecution evidence was disjointed. While PW4 and 7 testified that they took the accused to his house to change his clothes, PW10 contradicted that saying that the accused was stripped naked in the deceased house, and that it was his relatives who brought him clothes while he and the police officers were still at the deceased's house. The accused defence was in tandem with PW10's evidence. It is no exaggeration on accused part that he was taken into deceased house to the room where the deceased body lay.

27. I am fully aware that the accused has no burden to prove his innocence. It is sufficient if his defence raises doubt in the prosecution case against him. Taking that into consideration, I find that with the generalized evidence regarding blood stains on the accused clothing, and given the evidence of PW5, I find that the defence case that the police took the accused into the deceased room, where she lay in blood does raise doubt as to the exact point at which the light blood from the deceased got to accused jacket.

28. Regarding the purported murder weapon that was recovered, it was the defence Counsel's submission that although PW10 stated in his evidence that he conducted a thorough search in the room in which the deceased was found dead and recovered the iron bar under the mattress with some blood stains, the Government Chemist's report showed that no traces of blood stains were found on the metal rod. Counsel further submitted that if the deceased was murdered using the iron bar, the accused's fingerprint could at least have been traced on the weapon.

29. I have no comment on the issue of the possibility of finger prints being lifted from the iron bar said by PW10 to have been a possible murder weapon. However, PW5 did not find any blood on the iron bar, raising doubts regarding the alleged blood stains PW10 said he saw on the object, and whether it was indeed the murder weapon. The pathologist did however find that the murder weapons were both by a blunt and sharp objects, given the rough edges found on some of the wounds to the deceased head, including to the upper jaws, which caused death, and the lacerations on the head.

30. The other evidence against the accused was in evidence of PW4 and 7 that when they approached the accused at the scene of incident, the accused attempted to run away. The accused defence was that he was at the scene, where he went that morning after learning of the deceased death. He said that as he stood there in the crowd, he saw the deceased phone calling him. That is when he was apprehended and taken into the deceased house. In other words he denied trying to run away.

31. The way to consider that piece of evidence is to ask oneself whether the accused attempt to run away can be construed as proof of guilt. It did not escape my attention that the accused was in the crowd which gathered outside the deceased house when news spread of her murder. Is the accused conduct to go to the scene consistent with a person with a guilty mind? I do not think so. Being at the scene is sufficient to conclude that his mind was not guilty. The alleged attempt to run away was made after PW4 called the accused, according to PW7. However PW4 testified that the accused tried to run away after members of the public identified him as a boyfriend of the deceased.

32. The two police officers testimony does not tally. It is critical whether the accused tried to run when PW4 called him? Or whether he tried to run when members of public identified him as a boyfriend of the deceased? If he ran after he was connected to the deceased, then one could infer guilty mind. But for being called, guilt can hardly be inferred from that. Whichever it may be, just running away, in absence of any other evidence implicating the accused with this offence cannot on its own sustain a conviction.

33. As for the house being unlocked when the deceased was found dead is not proof beyond any reasonable doubt that it is the accused who could have gained access into the house due to his relationship with the deceased. The accused was not the only person the deceased could have opened her house to. The evidence that the one who murdered the deceased was well known to her, therefore causing her to open the door for them, is capable of an innocent explanation on the accused part. It could have been a host of other people who the deceased knew who could have caused her to open for them that night.

34. The accused put forward an alibi as his defence. He also called his sister-in-law, DW2, who corroborated his defence that on the night the deceased was murdered, the accused did not leave his house until the next morning. The accused alibi has shaken the prosecution's weak evidence against him, by raising doubt whether indeed the accused could have committed this offence.

35. I have considered the entire evidence adduced by the prosecution. I find that the inculpatory facts adduced by the prosecution are compatible with the innocence of the accused and capable of explanation of innocence, on the basis I have set out in this judgment. I find that there are other existing circumstances which weaken the chain of circumstances relied on by the prosecution. I find that the prosecution has failed to prove facts which justify the drawing of the inference of guilt, and that there are facts which exist in this case which rule out reasonable hypothesis of guilt.

36. In the Court of Appeal case of **CHARLES MATHENGE MWANGI & ANOTHER –V- REP CA NO. 72 OF 1997** (unreported), where OMOLO, TUNOI JJA and RINGERA Ag. JA held:

> ***"The answer must be that in a case depending on circumstantial evidence, each link in the chain must be closely and separately examined to determine its strength before the whole chain can be put together and a conclusion drawn that the chain of evidence as proved is incapable of explanation on any other reasonable hypothesis except the hypothesis that the accused is guilty of the charge – see for example REX vs. KIPKERING ARAP KOSKE & ANOTHER [1949] 16 EACA 135.***

37. I find the circumstantial evidence adduced by the prosecution, when considered cumulatively does not lead to a conclusion that the evidence adduced is incapable of any other explanation on any other hypothesis except that of accused guilt. I find that the evidence adduced is capable of an explanation of innocence on the accused part. The prosecution has therefore failed to prove the charge of murder contrary to **section 203** of the **Penal Code**, as against the accused to the required standard.

38. Before I end this judgment I must mention one more matter. It was the defence submission that the police forced the accused to sign a statement. I have gone through the entire evidence adduced by the prosecution in this case. I have found no mention of any statement being referred to or produced by the prosecution in support of their case.

39. I have come to the conclusion that the prosecution has failed to prove its case against the accused to the required standard. Accordingly, I give the accused the benefit of doubt under **Section 322** of the **Criminal Procedure Code** and acquit him for the offence charged.

DATED AND DELIVERED AT NAIROBI THIS 27TH MARCH,2017.

LESIIT, J.

JUDGE