



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIVASHA**  
**CRIMINAL CASE (MURDER) NO. 48 OF 2015**  
**(Formerly Nakuru HCCRC No. 17 of 2015)**

REPUBLIC.....PROSECUTOR

-VERSUS-

SIMON MWAURA MAINA.....ACCUSED

**J U D G M E N T**

1. **Simon Mwaura Maina**, the Accused herein was charged with Murder contrary to Section 203 as read with Section 204 of the Penal Code. In that on the 25<sup>th</sup> day of February, 2015 at Good for Village in Silibwet Location in Nyandarua West District within Nyandarua County, he murdered **Kosgey Sienyo**. He denied the charge. During the trial, he was represented by Mr. Gichuki.
2. The prosecution called eight witnesses. The prosecution case was as follows. **Beatrice Wangari Njuki (PW4)** owned a farm at Silibwet. In the material period, she had temporarily relocated to Engineer, Kinangop area to care for her ailing mother. On 5/2/2015 she purchased a cow and a heifer at Engineer. She summoned her Silibwet farm worker **Kosgey Sienyo** (deceased) to collect the animals and deliver them to her farm. The animals were driven to Silibwet by the said worker (deceased) and the Accused to Silibwet.
3. On the morning of 25/2/2015 **PW4's** close neighbor **Joseph Muhia Njoroge (PW3)** got concerned upon noticing that the animals at **PW4's** farm had not been led out. He drew close and called out but got no response from the deceased. He began to make inquiries as he noted that the heifer was missing from the cow shed. Meanwhile, at 10.00am the Accused approached a farmer at Silibwet by the name **James Mburu Wanjiru (PW2)** offering to sell him a heifer which he later showed him. Wanting to satisfying himself, **PW2** inquired of the Accused who informed him that the heifer had been given to him by his mother and kept by his sister until then.
4. **PW2** and his companion then requested the Accused to accompany them to office of the local chief **John Maina Mwangi (PW1)** with the aim of preparing an agreement. The chief having heard the Accused's account of how he had acquired the calf insisted on confirming with the Accused's sister. The Accused claimed to be unable to get her and the chief decided to keep the cow overnight. Soon, information was received from **PW3** that a heifer was missing from the home of **PW4**. Also the herdsman (deceased) was reported missing.
5. Neighbours were looking for the herdsman until 26/2/2015 when they spotted his body floating in a well at **PW4's** home. The body was retrieved. **PW4** was notified and came to the farm. The police took away the body. Post mortem examination of the body revealed injuries to the head and subdural haemorrhage as the cause of death. The Accused had gone into hiding in Nyeri. On 7/3/2015 police

traced and arrested him. He claimed that one **Pastor George Waweru** had given him the heifer. The said man was also arrested, but following investigations, the Accused was charged with the present offence.

6. When placed on his defence, the Accused elected to make an unsworn statement. To the effect that he resided at a place called Boiman, Nyandarua and was a farmer. That on 24/2/2015 he was requested by one **Pastor George Waweru** to escort the heifer to Waweru's home. It was 6.00pm, and that having started off on the errand the Accused realized it was late hence decided to keep the heifer overnight in his home. On the next morning while he was on the way to deliver the heifer as requested, he was stopped and questioned by the chief. **George Waweru** was summoned to the scene. The Accused went home leaving the heifer in the custody of the chief.

7. On the following day, the Accused left home in search of the alleged Pastor but did not find him on two consecutive days. Eventually the chief called him. But the Accused decided to travel to Nyeri to visit his ailing mother. He remained in Nyeri until his arrest on 7/3/2015. He told police how he had come into possession of the heifer and the 'pastor' was also arrested. Eventually he was charged alone. He admitted that the deceased was known to him but denied killing him.

8. There is hardly any dispute that on 26/2/2015 the deceased's body was retrieved from a well on the farm of **PW4** where he had worked. And that on the previous day, 25/2/2015, the Accused was in possession of a heifer claimed as property stolen from **PW4's** homestead. That the said heifer was detained by the chief, **PW1**. Thereafter the Accused travelled to Nyeri from where police arrested him on 7/3/2015. The court must determine whether, of malice aforethought, the Accused inflicted the injuries leading to the death of the deceased.

9. The prosecution case was based on circumstantial evidence, particularly, the Accused's possession of the heifer said to have been stolen from the homestead of **PW4**. There is firm evidence by **PW3** and **PW4** that the deceased was employed as a caretaker/herdsman by **PW4** and that he lived on her farm, while she was caring for her relative at Kinangop. Further the said latter witness testified that on 5/2/2015 she had acquired a cow and the heifer which she gave the deceased, and a second person, identified as the Accused, to transport to her Silbwet farm.

10. Her evidence on this aspect was corroborated by her close neighbor **PW3**. However regarding the involvement of the Accused in the transfer, evidence by **PW3** and **PW4** was that they did not know him prior to 5/2/2015. The police did not organize an identification parade hence the Accused's identification by these witnesses regarding events of 5/2/2015 tended towards dock identification.

11. Be that as it may, **PW1** and **PW2** gave evidence concerning the circumstances in which the Accused was in possession of **PW4's** heifer on the 25/2/2015. Both were well known to the Accused and interacted extensively with him during day time. The gist of the testimony by **PW1** and **PW2** is that the Accused was trying to sell the heifer in question to **PW2**. **PW1** testified that on being questioned, the Accused told him that the heifer had been given to him by his mother and kept for him by his sister, one **Waithera**, and that, he needed to use the sale proceeds to purchase seeds and fertilizer. When the Accused was unable to furnish confirmation of the alleged source of the heifer, **PW1** retained the heifer.

12. **PW2** narrated to court his dealings with the Accused on the material morning; being called by the Accused on phone regarding the heifer on sale, visiting the Accused's home to see the heifer, and negotiating the price. To **PW2** the Accused said his sister had two heifers and had given him one. Unable to get the sister's confirmation **PW2** proceeded with the Accused to **PW1's** office.

13. During cross-examination, **PW1** denied that the accused had explained to him that he was given the heifer by one **George Waweru Gakuru**, whom **PW1** admitted to be familiar with. Ditto **PW2**. The evidence by **PW1** and **PW2** clearly displaces the Accused's allegation that he was merely escorting the heifer to the home of **George Waweru Gakuru** on the material morning and hence the suggestion that the said person was the real culprit.

14. Indeed during his evidence, the Accused was hard pressed to explain how the heifer was in his home on 24/2/2015 by giving the lame reason that he had started towards the home of **Waweru** but realized it was too late to go there. Neither could he satisfactorily explain the fact that after the heifer was intercepted, he travelled to Nyeri where he remained until 7/3/2015. His claim to have been visiting his ailing mother was discounted by evidence by **PW1** and **PW2** that the Accused's mother had recently died.

15. In the statement under inquiry the Accused produced in his defence [**Exhibit 4**], the Accused had admitted to police that when intercepted by **PW1**, he was trying to sell the heifer to Mburu (**PW2**). Therein he explained that having received the cow on the 25/5/2015 from the one **George Mwaura aka George Waweru Gakuru**, he was instructed to take it to Mwaura's home but on the way there, he had decided to sell it to **PW2** to recover a debt. Further he stated in the said statement that indeed (contrary to his oral defence), he did meet the said 'Mwaura' after the heifer had been intercepted by the chief. That Mwaura told him to flee and not to mention his name.

16. The said **George Waweru** or **Mwaura** was infact arrested and released by police at the close of investigations. There is some merit in the defence submission that **George Mwaura Gakuru** should have been called as a prosecution witness. It seems however that police were not impressed with his *bonafides* and had him brought before the Magistrate's court at Engineer to execute a bond to keep the peace in connection with suspicion of his involvement in the murder. It is however not in dispute that it is the Accused who had the heifer in his possession at the time of attempted sale to **PW2** and not **George Waweru**.

17. In my view, **George Waweru Gakuru** cannot be considered a crucial witness in this case. Ditto the Accused's sister in Nyeri. The former could well have been accomplice while the latter seemingly had nothing to do with this case. She was a different person from the sister called **Waithera** earlier mentioned to **PW1** by the Accused. Further, there is no requirement for the prosecution to call a certain number of witnesses in proof of their case herein. Section 143 of the Evident Act states:

**"No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact."**

18. The Accused's described conduct showed that he had full control over the heifer as he attempted to sell it to **PW2** and never mentioned the ownership of the same by a third party. His explanation to **PW1** and **PW2** was infact that his sister/mother had given him the heifer, but seemingly the explanation changed upon arrest by bringing in **George Waweru Gakuru**. The foregoing inconsistency alone makes it difficult to attach much weight to the explanation given by the Accused for his admitted possession of the heifer. Secondly, the fact that the Accused fled to Nyeri after being caught with the heifer strongly suggests his guilty knowledge.

19. The Court of Appeal stated in **Odhiambo -Vs- Republic [2002] KLR 241** that recent possession of stolen goods can be proof of any offence. The court said:

**"Evidence of recent possession is circumstantial evidence which depending on the facts of each case may support any charge."**

20. The Court of Appeal for Eastern Africa stated in the case of **Republic -Vs- Kipkering Arap Koskei [1949] 16EACA 135** that:

**".....In order to justify on circumstantial evidence the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and in capable of explanation upon any other reasonable hypothesis than that of his guilt, and 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 always on the prosecution and never shifts to the accused."**

21. And further in **Simon Musoke -Vs- Uganda (1958) EA 715** quoting from the case of **Teper -Vs-**

Republic [1952] 2 ALLER 447 the court held that:

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

22. In this case, the Accused was on 25/2/2015 in possession of the heifer stolen from **PW4’s** home, most likely a day or two before. It seems that due to his close proximity to **PW4’s** home, **PW3** could observe most of the goings on from his own home. On the material morning, he was struck that contrary to the usual observed practice, he had not seen the deceased take out the livestock consisting of a cow, heifer and goats out to pasture. When **PW3** went over to the home he did not find the deceased. The animals were still in the sheds although the heifer was missing.

23. **PW3** started making inquiries with different people on the whereabouts of the deceased until he learned of the recovery of the heifer by the chief (**PW1**) later in the day. Both **PW3** and **PW4** did confirm that the cow and heifer had been brought to **PW3’s** homestead about 20 days prior to the material date. The post mortem report records the various injuries to the deceased’s head and indicated that the body was well preserved. This despite the fact that the body was retrieved from a well. The photographs of the body confirm that the body was still intact and that there were no signs of bloating or putrefaction at the time of retrieval. The photographs of the body while in the mortuary indicate clear fresh wounds on the head. All this evidence in my opinion suggests that the body had barely been in the well for more than two days prior to the retrieval.

24. Clearly, the deceased died a violent death through bludgeoning. There were fractures on top of the head. **Doctor Karimi (PW6)** discounted the possibility that the injuries could have resulted from a fall into the well, basing his opinion on the location of the fracture (middle of head), and the fact that the fracture was not rugged. **PW3** told the court that the search party comprising villagers inspected the well after seeing blood spots at the well mouth and that a bloody gunny bag was the first object to be fished out. This was also confirmed by a villager **Moses Wagura Muchemi (PW5)** and the area chief **PW1**.

25. Admittedly, the Accused had the heifer in question since 24/2/2015. It is reasonable to conclude in the circumstances of this case that the death of the deceased coincided with the theft of the heifer, from the custody of the deceased. He was bludgeoned to death by the thief or thieves to facilitate the taking away of the heifer, and possibly other animals, later.

26. Regarding the application of the doctrine of recent possession, the Court of Appeal stated **Malingi - Vs- Republic (1989) KLR, 225:-**

**“By application of the doctrine (to wit doctrine of recent possession) the burden shifts from the prosecution to the accused to explain his possession of the item complained about. He can only be asked to explain his possession after the prosecution has proved certain basic facts. Firstly, that the item he had in his possession had been stolen; it had been stolen a short period prior to the possession; that the lapse of time from the time of its loss to the time the accused was found with it was, from the nature of the item and circumstances of the case, recent; that there are no co-existing circumstances which point to any other person as having been in possession of the item. The doctrine being a presumption of fact is a rebuttable presumption. That is why the accused is called upon to offer an explanation in rebuttal, which if he fails to do an inference is drawn that he either stole it or was a guilty receiver.”**

27. In this case, the Accused was in possession of a heifer positively identified as **PW4’s** property stolen from her farm. The possession was within less than two days since the heifer was stolen. The Accused was unable to convince **PW1** and **PW2** that he lawfully came into possession, resulting in the retention of the heifer by **PW1** on 25/2/2015. The explanations he gave **PW1** and **PW2** are totally different from the one he gave police on arrest. The explanation he gave this court during his defence differs in material respects with the one given to the police. He told the court that he was escorting the heifer to Waweru’s home on 25/2/2015 but he had stated in his statement to police earlier that he was trying to sell the heifer

to recover a debt, at the time of interception.

28. In my considered view, this is a proper case for the application of the doctrine of recent possession. The explanation expected of the Accused is merely a reasonable one. No such explanation has been given to this court. How he came into possession of the heifer is a fact within the Accused's knowledge. His contradictory explanations do not amount to a reasonable explanation. Secondly, the Accused escaped from Boiman (Silibwet) to Nyeri upon being intercepted with the heifer by **PW1**. This action demonstrates a guilty mind. Whether or not the Accused acted in cahoots with the mentioned **George Waweru Gakuru** does not matter. The Accused was in possession of the heifer and trying to dispose of it by sale on 25/2/2015, and the burden shifted on him to explain the possession has not been discharged.

29. Reviewing the evidence in this case, the proven facts point unerringly to the Accused as a culprit not only in the theft of the heifer but also in the murder of the deceased. In the absence of a reasonable explanation, it must be concluded that the only reason why the Accused was in possession of the stolen heifer so soon after theft, and later went into hiding is that he was involved in the murder of deceased. There are no intervening factors to destroy that conclusion.

30. The motive of the murder was clearly the theft of **PW4's** stock. The injuries inflicted on the deceased's head were severe and led to his death. The murderer(s) then dumped the body of the deceased in a well in order to conceal the murder and create opportunity to dispose off the stolen heifer. These facts demonstrate malice aforethought on the part of the Accused. I therefore find the Accused guilty of the offence charged and will convict him accordingly.

**Delivered and signed in Naivasha this 13<sup>th</sup> day of April, 2017.**

In the presence of:-

Mr. Mutinda for the DPP

Mr. Gichuki for the Accused

Accused - present

CC - Barasa

**C. MEOLI**

**JUDGE**