



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CRIMINAL CASE NO. 24 OF 2015**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**DAMARIS MUENI MUSAU.....ACCUSED**

**JUDGMENT**

**Introduction**

Damaris Mueni Musau, whom I will call “the accused” in this judgment, is charged with the murder of her husband Raphael Matheka Nzembu, referred to in this judgment as “the deceased”. The charge is brought under Section 203 as read with Section 204 of the Penal Code. In the particulars of the offence it is stated that on an unknown date between 19<sup>th</sup> December 2014 and 24<sup>th</sup> December 2014 at Umoja One Estate, Buruburu Division within Nairobi County she murdered Raphael Matheka Nzembu. The accused was arraigned in court on 23<sup>rd</sup> February 2015 but the charges were not read to her on that day. The matter was deferred to 2<sup>nd</sup> March 2015 when the plea was taken. The accused pleaded not guilty to the charge. The trial proceeded to full hearing with the prosecution lining up a total of fifteen (15) witnesses in support of its case. At the conclusion of the case for the prosecution this court found that a prima facie case had been made out against the accused and placed her on her defense. The accused is the only witness for the defense.

**Prosecution Case**

The deceased and the accused were married and had one child, a daughter. They lived in a rental house in Umoja One Estate in Nairobi. The house belonged to Beatrice Waringa, PW14, (Beatrice). They also owned their own house in Umoja Estate being House No. K60. They had rented it out. Evidence as to how the relationship between the deceased and the accused is scanty but going by the circumstances of this case, their relationship may not have been a peaceful one. Evidence shows that the deceased went missing on the evening of 19<sup>th</sup> December 2014. On that day at about 8.00pm the deceased had met Erick Kyalo Kisuna, PW6, (Kisuna) and Johnstone Kimwele, PW7, (Kimwele) at a kiosk in Umoja One Nairobi. This kiosk is situated opposite a supermarket called Satellite. Kisuna and Kimwele were friends of the deceased and knew him from their respective rural homes in Makueni County. They stayed together with the deceased talking and taking tea for about 20 to 30 minutes then they parted ways. The deceased escorted Kisuna for some time and left him. The deceased walked towards his home and Kisuna believed that he had gone home. Kimwele also went away.

The deceased was not reachable after this. Neither his family members, including his nephews Jeremiah Kyalo Mwanthi, PW4, (Jeremiah) and Erick Mumo Mutisya, PW5, (Mumo), nor his employee David Mutinda Ndolo, PW9, (Mutinda) could reach him the following day and the days thereafter. On 22<sup>nd</sup>

December 2014 in the afternoon, Jeremiah puts the time at 3.00pm while Mumo said it was in the evening after work, the two cousins decided to look for the deceased at his Umoja One rental home. They met the accused and her daughter walking towards a kiosk. They stopped her and asked her the whereabouts of the deceased. The accused told them that the deceased had travelled to Mombasa and she too was waiting for him to return. After futile attempts to reach the deceased, the two cousins, Jeremiah and Mumo, decided to report the matter at Buruburu Police Station, which they did on 24<sup>th</sup> December 2014.

On 25<sup>th</sup> December 2014 Mumo and other relatives returned to the Police Station to find out whether there was any news in regard to the deceased. Police told them about a body that had been retrieved from a river over Kariobangi Bridge on 20<sup>th</sup> December 2014 and taken to the City Mortuary. They were advised to go to the Mortuary and identify the body in case it turned out to be that of their relative.

The circumstances surrounding the recovery of the body of the deceased are that on 20<sup>th</sup> December 2014 street boys collecting garbage at the river stumbled upon polythene bags containing human remains and reported to the police at Buruburu Police Station. Police visited the scene and confirmed that indeed there was a body in two plastic bags. It was collected and taken to the City Mortuary. The remains were identified by the relatives as the body of the deceased Raphael Matheka Nzembu.

The accused was arrested by the police on 3<sup>rd</sup> February 2015 as she attempted to sell their house K60 in Umoja Estate to undercover police officers posing as buyers. She was charged with this offence. The chain of events leading to the sale of the house began on 20<sup>th</sup> December 2014. On that date at 6.00am, the accused went to the home of Felistas Mumbua, PW1, (Felistas). The accused was a close friend of Felista. She told Felistas that she had been evicted from their house for failure to pay rent for three months and that her husband was away in Mombasa. She sought to be accommodated by Felistas. The accused and her daughter stayed with Felistas from 20<sup>th</sup> December 2014 until the time of her arrest on 3<sup>rd</sup> February 2015. In the course of her stay she asked Felistas to assist her to get a buyer of their house in Umoja to enable her pay school fees for her daughter and rent. Felistas told her son-in-law Enock Musyimi Wambua, PW2, (Enock) to assist in looking for a buyer. Enock had gone to visit his mother-in-law Felistas on 17<sup>th</sup> January 2015 when he was introduced to the accused and her daughter and requested to assist in looking for a buyer for the house.

Enock contacted Peter Mutua, PW3, (Mutua) on the same day 17<sup>th</sup> January 2014 and requested him to assist him to get a buyer for the accused. Mutua used to sell properties and had lived in Umoja for a long time. Mutua asked Enock to provide the particulars of the house. Mutua learned that the house was in the name of Raphael Matheka Nzembu and that the house number K60 in Umoja Estate did not have a title deed but a certificate. He also learned that the selling price was five million shillings (5,000,000). Mutua decided to contact another agent who lived in Umoja since he had relocated from Umoja. The person Mutua contacted is Kimwele. He gave Kimwele details of the house and asked him to look for a buyer. Kimwele called Jeremiah about the issue and they decided to report the matter to the police. Evidence as to what led to the decision to report the matter to the police is not available but it is not lost to this court that at this time Kimwele knew that the deceased had gone missing under mysterious circumstances and that he had died. PC Pharis Toya, PW10, posed as the buyer with another police officer CPL Stella Ashitemi (not a witness) posing as the buyer's wife.

On 26<sup>th</sup> January 2015, Kimwele called Mutua and informed him that he had found a buyer for the house. On 30<sup>th</sup> January 2015 Kimwele called Mutua and informed him that the buyer had confirmed the particulars of the house and that he was willing to buy it at 4.3 million shillings. They agreed to meet at the offices of an advocate to make the transaction. This information was relayed to the accused who was also asked to carry all the original documents pertaining to the house. All the parties agreed to meet on 3<sup>rd</sup> February 2015 at the offices of C. J. Chirchir & Associates in Transnational Plaza Mama Ngina Street, Nairobi. The accused arrived at the advocates offices with Mutua and Enock and met the buyer and his witnesses. The buyer and his witnesses introduced themselves as police officers and the purpose of their involvement. This led to the arrest of the accused together with Enock and Mutua. The two were later released and the accused was charged with this offence.

## **Defence Case**

In her defence given under oath, the accused told the court that her late husband went home for lunch with Kisuna and Kimwele on 17<sup>th</sup> December 2014 and after lunch they discussed a business trip they intended to take on 19<sup>th</sup> December 2014. She said that she did not hear the details of their discussion about the trip. She said that on 19<sup>th</sup> December 2014 the deceased left their home at about 4.00pm after telling her that he was going to join Kimwele, Kisuna, Jeremiah and one Makumi to go on a business trip. She told the court that on 21<sup>st</sup> December 2014 Jeremiah, Mumo and Kimwele met her at 7.00pm as she was going to a shop with her daughter and asked her where the deceased was. She told the court that this surprised her because her late husband had told her that he was going on business trip with the three.

She further testified that on 22<sup>nd</sup> December 2014 Beatrice their landlady went to her house with her nephew and demanded to be paid Kshs 48,000 claiming it was rent for four months and that Beatrice took with her their big refrigerator, two charcoal burners and a 210 litre jericin claiming that she would keep the items in lieu of her owing rent; that on 23<sup>rd</sup> December 2014 she went to their house K60 and requested the tenant to store for her household goods as she waited for her husband to return and pay rent; that the tenant agreed to do so; that when Beatrice saw the handcart that was to be used to carry the household goods to the tenant's place she went to report to the police that the accused intended to leave without paying rent and that the police told them to resolve the issue and sent them to Buruburu Police Station.

The accused denied planning to sell their house. She denied having been arrested at the advocates offices and stated that she had taken Enock's wife to town to buy wedding items and that they had been joined by Enock when the police arrested her. She denied having taken original documents in respect of their house to the advocate's office stating that those documents were brought by the police officers. She said she had reported that her husband had gone missing and that the police had recorded this report on the Occurrence Book.

## **Submissions**

At the close of the defence case, Mr. Ratemo counsel for the accused undertook to file written submissions on or before 3<sup>rd</sup> July 2017 but by the time of writing this judgment in August 2017 there are no submissions filed. I will therefore rely on the submissions presented at the close of prosecution case. Mr. Ratemo had submitted that the people who were with the deceased before he went missing, Kimwele and Kisuna, were not arrested; that the sale of the house was not connected with the death of the deceased; that the deceased did not go home on 19<sup>th</sup> December 2014 after meeting Kisuna and Kimwele because when his body was recovered, the deceased was still wearing the same clothes he had on the date he went missing and that the accused had reported the disappearance of her husband to the police at Umoja Police Post. Counsel further submitted that the investigations by the police were poorly carried out and that the prosecution has failed to prove the case against the accused. The prosecution did not file any submissions.

## **Analysis and determination**

The burden in a murder trial lies with the prosecution to prove that death of a human being has occurred; that the death was caused by an unlawful act or omission by the accused person before the court and that the accused in committing the unlawful act or omission possessed malice aforethought. The threshold to be met is proof beyond reasonable doubt.

The body of the deceased was retrieved from Nairobi River on 20<sup>th</sup> December 2014. The body was in two polythene bags. It was mutilated. PC David Kipchumba, PW11, (PC Kipchumba) who photographed the scene testified that:

***“At the scene there was a street family collecting some waste materials along the river. They showed me two polythene bags. Inside were mutilated parts of the body. One bag had the upper***

***part of the body and in the other was the lower part of the body. It was the body of a male African adult. It seemed as if it had been killed elsewhere and dumped at the place. I later knew the deceased as Raphael Matheka Nzembu.”***

PC Kipchumba took sixteen (16) photographs showing the body parts in different views. The photographs were produced in evidence as exhibits 9(a) to 9 (p) all inclusive. The body parts were transferred to the City Mortuary. The examination of the body was done on 30<sup>th</sup> December 2014 by Dr. Charles Muturi, PW13, (Dr. Muturi). The doctor found multiple slash wounds on the head and right forearm. The neck was almost totally decapitated with the head held to the body by the skin. The torso was amputated from the hip and there was near total amputation of the right ankle joint. The doctor formed the opinion that the deceased died as a result of multiple injuries due to sharp force trauma. The body was identified to the doctor by deceased’s nephews Jeremiah, Mumo and brother Alexander Muli Nzembu (not a witness). With the above evidence I have no doubt in my mind that the unlawful death of the deceased has been confirmed and has been proved beyond reasonable doubt.

The next twin issues to be addressed are who caused the unlawful death of the deceased and did the person or persons who caused this death do so with malice aforethought. To resolve these issues this court must turn to circumstantial evidence. There is no direct evidence to guide this court on what happened between the time the deceased was last with Kisuna and Kimwele on the evening of 19<sup>th</sup> December 2014 and the time his body was discovered dumped in Nairobi River the following day on 20<sup>th</sup> December 2014.

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.”***

The circumstances in this case are worth repeating at this stage of determination. They are that the accused and the deceased were married. They had one child, a daughter aged about 10 years. Very early on 20<sup>th</sup> December 2014 at 6.00am the accused went to the home of the Felistas and told her they had been evicted from the house she shared with her husband the deceased. She also told Felistas that her husband had travelled to Mombasa and that he had called her to report that they had been carjacked at Mtito Andei and that the deceased had also called two of his cousins to inform them of the carjacking. The accused further told Felistas that she had tried to call her husband but his phone was not going through. Felistas asked her if she had reported to the police to which she responded that cousins to the deceased were to report. According to Felistas, the accused lived with her from that date, 20<sup>th</sup> December 2014, to the time of her arrest 3<sup>rd</sup> February 2015 and that all this time the accused never said anything about her husband and his whereabouts.

As shown in the evidence I have narrated above the accused sought for a buyer of their house in Umoja and the circumstances surrounding the sale of that house led to her arrest and this charge. Evidence shows that the accused visited their business at Umoja where Mutinda was employed as the pump attendant. This was on 20<sup>th</sup> December 2014. Mutinda had not met the accused and did not know that she was deceased’s wife. She introduced herself as the wife to the deceased and asked Mutinda to give her Kshs 100 to buy food saying her husband had gone to look for money to pay rent. The accused returned to the business on 22<sup>nd</sup> December 2014 in the evening. She told Mutinda she wanted the proceeds of the day but he refused to give her any money. She returned to the business on 24<sup>th</sup> December 2014 after Mutinda called her on the number she had given him and reported that the pumping machine was faulty. She did not bring a technician to repair the pump but told Mutinda to close the business until 27<sup>th</sup> December 2014 to enable her look for a technician. She also asked for the key to the business and she was given. Mutinda closed work and tried to call the accused without success. The accused called him on a different number and told him to wait for the deceased to return because she did not have money to pay the technician. On the evening of 27<sup>th</sup> December 2014 Mutinda went to the business where he met Jeremiah and Nzomo relatives of the deceased. They opened the business and found the pump missing.

Further evidence on the circumstances surrounding the death of the deceased are that on the night of 19<sup>th</sup> December 2014 Beatrice who lived on the ground floor of the building in which she had rented out to the deceased and accused heard screams on the floor above hers. This is the house where the deceased and accused lived. Beatrice called another tenant Christine (not a witness) to go to the place and check what was happening. Christine reported to her that the house was locked and lights were off. Beatrice thought nothing of it. In the morning, on 20<sup>th</sup> December 2014, Beatrice noted that the house where accused and deceased lived was locked with a padlock and she thought there was no one inside. She told the court that she did not see the deceased or the accused on that day. On 21<sup>st</sup> December 2014 the accused went to Beatrice and told her that she wanted to move houses because the deceased had refused to pay rent. The accused did not tell Beatrice that the deceased had gone to Mombasa. She told her that he had gone to the business and would return home. Beatrice called the deceased but failed to go through. Beatrice decided to go to look for the deceased at his business but failed to get him. She learned that deceased had not been seen for three days prior to 21<sup>st</sup> December 2014. Beatrice decided to report the missing of the deceased to the police. She also reported that the accused was planning to move houses in the absence of the deceased.

From the evidence of Felistas, to that of Mutinda and then Beatrice, there is none showing that the accused was concerned about the disappearance of her husband. If indeed she had information that her husband had travelled to Mombasa and got carjacked on the way at Mtito Andei, the accused did not seem to have done anything to report this to the police. Although she said that she reported the disappearance of her husband to the police, there is no such evidence. It is Beatrice who reported that the deceased had disappeared and that the accused intended to move houses. Beatrice was taken to task in cross examination to the effect that she was following up on her rent and was not concerned about the disappearance of the deceased. She denied this and stated that her intention was to have the deceased available to tell her that the family wanted to move houses. The accused insisted that she reported to the police about her missing husband but the only evidence is that she told the police her husband had gone on safari. This obviously is not the same thing as missing.

While circumstantial evidence is said to be the best evidence to base a conviction on, courts are required to exercise caution in relying on circumstantial evidence. As stated in **Teper v. R [1952] AC at p. 489** the court stated that:

***“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.”***

It is with such caution in mind that I have subjected the evidence in this case to serious scrutiny to ensure that the above threshold is met.

What disturbs me is that the accused did not seem bothered by her husband’s disappearance. Her conduct and behaviour is suspect. Evidence shows that she lived with her husband. She said nothing to this court about whatever difficulties the family faced and gave contradicting stories about the whereabouts of her husband to Felistas, Beatrice, Mutinda and the police. From 20<sup>th</sup> December 2014 to 3<sup>rd</sup> February 2015 she lived with Felistas and attempted to sell their house which was in the name of her husband who had gone missing. Her phone was not reachable by the relatives of her husband and she did not attempt to look for her husband or contact the family of the deceased and the police to assist her in searching for him. Beatrice told the court that she had heard screams in deceased’s house on the evening of 19<sup>th</sup> December 2014 and found the house locked in the morning of 20<sup>th</sup> December 2014.

While evidence shows that Kisuna and Kimwele may have been the last people to see deceased, there is evidence from both of them that they parted ways with him and they believed that he went home. There is no further evidence to show whether the deceased reached his home. The fact that his body was found clothed in the same clothes he wore when last seen by Kimwele and Kisuna shows that either he did not reach home or if he reached home he did not get the opportunity to change his clothes.

How could the accused feign ignorance about her husband's whereabouts when evidence shows that they lived together? How come she did not report his disappearance to the police? Why did she switch off her phone after her husband disappeared? Why did she not contact family of the deceased or report to the police but only told the police that her husband had gone on safari? Why did she leave her house and seek accommodation with Felistas? Why did she attempt to sell their house when she was aware that it was in the name of her husband? I could go on with these questions. The questions in this case are many and they have no answers. The deceased was buried in the absence of the accused who was not reachable. Even after his burial the accused did not seem to have done anything about searching for him or even reaching out to the relatives.

I have considered the defense of the accused. She called Felistas a liar. This is what she said in cross-examination:

***“Felistas was my great friend. We had not disagreed with her. Felistas lied to the court in her evidence. I did not go to her place on 20<sup>th</sup> December 2014 at 6.00am and claim my house had been locked by the landlady. I did not tell her my husband had been hijacked at Mtito Andei. Beatrice lied to the court.”***

She further stated in cross-examination as follows:

***“I reported my husband was missing after 3 days. I went to report at Umoja One Police Post who referred me to Buruburu [Police Station]. I reported and cannot explain why it is not captured.”***

And:

***“I went to Felistas on 24<sup>th</sup> December 2014 up to February 2015. I did not see Enock (PW5) come to visit Felista. I know nothing about Enock.”***

This evidence is contradicted. There is evidence showing that the accused told police that her husband had gone on safari. Felistas and Enock have testified and I have no reason to doubt their evidence. When a comparison between the accused's evidence and that of Felistas and Enock is made, it is obvious that it is the accused that is lying to the court. Given her behaviour throughout the period in reference 20<sup>th</sup> December 2014 to 3<sup>rd</sup> February 2015 when she was arrested the accused seemed to have something to hide. This is further exacerbated by accused's denial that she did not take the documents in respect to the sale of their house to the advocate's office and that the documents were brought by the police when there is ample evidence to show that she is the one who went to the advocates office with the documents.

From the circumstances of this case, can it be said that the accused had nothing to do with the death of the deceased? My answer to this is “No”. There is a lot against her. In my considered view, the way the deceased was killed could not have been done by accused alone. But I fail to believe that she is innocent and knew nothing about her husband's death. The circumstances of this case should be gauged through the lens of the decided authorities on circumstantial evidence. 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, which cited with approval the following passage from the Privy Council decision in Teper V. R. [1952] AC 480 at P.489, to add the following:

***“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”.***

With these authorities in mind and having painstakingly analysed and considered the evidence as captured by this court and the law, it is my view that the circumstances from which an inference of guilt is sought to be drawn in this case have been cogently and firmly established; these circumstances are of a definite tendency unerringly pointing towards guilt of the accused; and that the circumstances taken cumulatively, 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. I have stated that she may have had accomplices to this murder. The conduct of the accused after the deceased went missing is not compatible with her innocence.

I note that the charge does not state that the accused committed this offence **“jointly with others not before the court”**. The information is drafted in a way that points to the accused as the only person who committed this offence. This is an omission that ought to have been rectified before the case was heard. However the law under Section 382 of the Criminal Procedure Code allows courts to sanitize errors such as this one by providing that:

***Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:***

***Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.***

I proceed to so sanitize the charge sheet and add to the charge the words **“jointly with others not before the court”**. In so doing I am convinced that no prejudice has been occasioned to the accused.

Section 20 of the Penal Code describes the principal offenders and as follows:

***20. (1) When an offence is committed, each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence, and may be charged with actually committing it, that is to say-***

***(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;***

***and in the last-mentioned case he may be charged either with committing the offence or with counseling or procuring its commission.***

***(2) A conviction of counseling or procuring the commission of an offence entails the same consequences in all respects as a conviction of committing the offence.***

***(3) Any person who procures another to do or omit to do any act of such a nature that, if he had himself done the act or made the omission, the act or omission would have constituted an offence on his part is guilty of an offence of the same kind, and is liable to the same punishment, as if he had himself done the act or made the omission; and he may be charged with doing the act or making the omission.***

The above provision of the law ensures that no one who is in any way connected with the offence is left out and that everyone who takes part in committing the offence no matter what role he/she played in held accountable and must take responsibility for committing the said offence.

In conclusion, it is my view that circumstantially, the accused participated in the murder of her husband. She has lied to this court and this court must as a consequence reject her defense. I am satisfied that all the circumstantial evidence availed to this court point to the accused as having participated in whatever plan that may have been made to murder her husband. The manner in which the deceased met her death is cruel beyond measure. In killing the deceased in the manner he was killed, the killers must have had malice aforethought as defined under Section 206 of the Penal Code. In my view I am satisfied that the evidence, though circumstantial proves beyond reasonable doubt that all the ingredients of murder have been proved beyond reasonable doubt against the accused. I find Damaris Mueni Musau guilty. Consequently, I enter conviction against the accused for the murder of Raphael Matheka Nzembu. It is so ordered.

**Delivered, signed and dated this 26<sup>th</sup> September 2017.**

**S. N. Mutuku**

**Judge**