



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CRIMINAL CASE NO. 20 OF 2010**

**REPUBLIC.....RESPONDENT**

**VERSUS**

**DAVID NJENGA KAHU.....1<sup>ST</sup> ACCUSED**

**JOYCE KATHAMBI SOLOMON.....2<sup>ND</sup> ACCUSED**

**SAMSON MUIGAI NGURU.....3<sup>RD</sup> ACCUSED**

**JUDGMENT**

The three accused persons namely **DAVID NJENGA KAHU** (hereinafter referred to as the 1<sup>st</sup> accused), **JOYCE KATHAMBI SOLOMON** (hereinafter referred to as the 2<sup>nd</sup> accused) and **SAMSON MUIGAI NGURU** (hereinafter referred to as the 3<sup>rd</sup> accused) were all jointly charged with the offence of **MURDER CONTRARY TO SECTION 203 as read with SECTION 204 OF THE PENAL CODE.**

The particulars of the charge were given as follows:

***“On the night of 6<sup>th</sup>/7<sup>th</sup> February 2010 at Githima area in Nakuru Municipality in Nakuru District within Rift Valley province, jointly with another not before court murdered PETER NJOGU GACHIGI”.***

All the three accuseds pleaded ‘Not Guilty’ to the charge. Their trial commenced on 20/7/2010 before **Hon. Justice D. K. Maraga** (as he then was) who heard the evidence of the first three (3) prosecution witnesses. On 2/12/2010 **Hon. Lady Justice R. Wendoh** took over the matter and heard the evidence of the next nine (9) prosecution witnesses. Following her transfer to the Meru High Court I took over the case and heard the remaining two (2) witnesses. The prosecution called a total of fifteen (15) witnesses in support of their case.

The deceased was a gentleman who lived at Githima Estate in Nakuru. He was a landlord who lived in his own house but also had several rooms for rental within his compound.

The 1<sup>st</sup> accused had been employed by the deceased as a night watchman during the material time. He worked from 6.00pm to 6.00am daily. The 2<sup>nd</sup> accused was one of the deceased tenants and was also said to be a girlfriend to the deceased.

**PW2 CLARA SAITA** was a ten year old girl who lived with her parents in one of the deceased’s rental houses. She told the court that on 7/2/2010 in the morning she woke up and went to the compound of the deceased to draw water. Whilst there the child says she saw ‘Joy’ the 2<sup>nd</sup> accused leaving the house of the deceased carrying a TV strapped to her back with a lesso. The child went and informed another tenant about what she had seen.

**PW1 CHRISTINE NANJALA** was also one of the tenants in the deceaseds rental rooms. She told the court that on 7/2/2010 at 7.00am she heard the child **PW2** speak about what she had seen. **PW2** got out of her house and saw the 2<sup>nd</sup> accused leaving the deceased’s house carrying a TV, DVD player and a radio in a lesso all strapped to her back. When **PW1** questioned the 2<sup>nd</sup> accused about the items she was carrying the 2<sup>nd</sup> accused retorted that these items belonged to her.

Shortly thereafter it was noticed that the deceased house was on fire. **PW2** and the other tenants rushed to the house and found a mattress on fire. Inside the house was a blood stained panga. Upon searching further the tenants recovered the body of the deceased bleeding from severe cuts lying in the bath room. The matter was reported to police and the relatives of the deceased were also alerted.

**PW10 CHRISTINE WANGARI GACHIGI** was the deceased's sister. She told the court that on 7/2/2010 she received information that her brother had been murdered. On Monday 8/2/2010 **PW10** travelled to Nakuru. She went to the mortuary where she viewed the body of her late brother. Later **PW10** went to the police station to enquire about the progress of investigations into the murder.

In the course of investigations **PW10** accompanied police to a house at Gilani's Estate where the 1<sup>st</sup> accused was said to have left a parcel of clothes. Inside that house police recovered a bag containing some shirts and **PW6 MARGARET MBURU** the niece to the deceased identified one stripped shirt as belonging to the deceased.

Thereafter police went and searched the house of the 2<sup>nd</sup> accused where they recovered certain items of clothing which were blood stained. Later on the police made a visit to Jomvu in Mombasa County where they arrested the 3<sup>rd</sup> accused in possession of a mobile phone said to have belonged to the deceased.

Upon completion of police investigations all the 3 accuseds were arraigned in court and charged with this offence of murder.

At the close of the prosecution case the court acquitted the 3<sup>rd</sup> accused but ruled that the 1<sup>st</sup> and 2<sup>nd</sup> accused persons both had a case to answer. The 1<sup>st</sup> accused gave a sworn defence whilst the 2<sup>nd</sup> accused gave an unsworn defence, - each denied any involvement in the murder of the deceased.

This court must now analyse the evidence on record and make a determination as to whether the charge of murder has been proved beyond reasonable doubt as required in law.

Section 203 of the Penal Code Cap 63 Laws of Kenya defines the offence of murder in the following terms

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

In order therefore to prove a charge of murder the prosecution must tender evidence sufficient to prove beyond reasonable doubt the following ingredients of the charge

- 1) Proof of the fact as well as the cause of death of the deceased
- 2) Proof of an unlawful act or omission on the part of the accused's leading to the death of the deceased.
- 3) Proof that said unlawful act or omission was committed with malice aforethought.

On the question of the fact of the death of the deceased there can be no controversy. Several of the tenants of the deceaseds testified that they saw his body with severe cuts and bruises lying dead on the bathroom floor of his house. **PW6** and **PW10** the niece and sister of the deceased confirm the fact of his death.

**PW9 ELIZABETH WANJIRA EVANS** another sister to the deceased told the court that on 23/2/2010 she went to the Nakuru War Memorial Hospital Mortuary where she identified the body of the deceased to the doctor who performed the autopsy. Finally on this point **PW14 SUPT SAMBU WAFULA** a gazetted Scenes of Crime Officer told the court that on 7/2/2010 he went to the scene of the incident where he took several photographs. The photographs clearly depicted the body of an adult man lying dead on the floor. The said photographs were produced in this court as exhibits **P. exb 12** to **P. exb 23**.

Evidence regarding the cause of death was tendered by **PW7 DR. TITUS NGULUNGU**, the consultant pathologist who performed the autopsy on the body of the deceased. **PW7** told the court that the body had multiple deep cuts to the head and skull as well as bruises and incisions all over the body. Based on his examination **PW7** concluded that the cause of death was **‘massive haemorrhage, accelerated by head injury with subdural haematoma due to multiple incision wounds due to bleeding and trauma to the head’**. **PW7** filled and signed the post-mortem report which he produced as an exhibit **P. exb 1**. It is clear therefore that the deceased met his death due to a savage and brutal attack to his person.

Having proved the fact as well as the cause of death the prosecution must go further and tender evidence to prove beyond reasonable doubt that it was the 3 accuseds (or one of them) who committed the act of unlawfully assaulting the deceased and inflicting the injuries which led to his death.

I wish at the outset to deal with the case against the 3<sup>rd</sup> accused (whom this court has already acquitted for having no case to answer). As stated earlier the prosecution called a total of fifteen witnesses in this case. Not a single one of the witnesses who were at the scene of the incident made any mention of the 3<sup>rd</sup> accused. None of them knew who he was or why he was in court. The only witness who made any mention of the 3<sup>rd</sup> accused was **PW12 CHIEF INSPECTOR CHARLES MALUKI**, who was the investigating officer. He told the court that it was the 2<sup>nd</sup> accused who led him to Jomvu in Mombasa County and pointed out the 3<sup>rd</sup> accused. It is instructive that the 2<sup>nd</sup> accused did not identify the 3<sup>rd</sup> accused as one of the men who killed the deceased or even as an accomplice. She merely identified the 3<sup>rd</sup> accused as a man to whom she had sold a mobile phone which allegedly belonged to the deceased.

To simply purchase a mobile phone does not make one guilty of murder. The 3<sup>rd</sup> accused was an innocent purchaser. He did not know the origins of the mobile phone he had purchased and certainly he had no way of knowing that the owner of the phone was deceased. I find no evidence at all to link the 3<sup>rd</sup> accused to the murder of the deceased. The only person who linked the 3<sup>rd</sup> accused to this matter was the 2<sup>nd</sup> accused. This was evidence of a co-accused which is suspect and certainly would not suffice as the basis for a conviction. In my view the

police would have done better to treat the 3<sup>rd</sup> accused as a witness rather than charging him. For the above reasons I found that no prima facie case had been shown against the 3<sup>rd</sup> accused and I do confirm his acquittal under Section 306(1) of the Criminal Procedure Code.

Regarding the 1<sup>st</sup> accused, he was said to have been a night watchman employed by the deceased. In his sworn defence the 1<sup>st</sup> accused confirms this fact. There was no witness who saw the 1<sup>st</sup> accused assault or attack the deceased at all during that night. There was no evidence of any disagreement or any bad blood between the two. The 1<sup>st</sup> accused had been linked to the murder only due to the recovery of a shirt allegedly belonging to the deceased in a house which the 1<sup>st</sup> accused occupied.

**PW4 DUKE MOKAYA** a boda boda operator told the court that he lived at Gilani Estate in Nakuru. The witness told the court that he knew the 1<sup>st</sup> accused as a customer. **PW4** told the court that he used to allow the 1<sup>st</sup> accused to come and sleep and refresh himself in his house after being on night duty. In February 2010 the 1<sup>st</sup> accused came to the house of **PW4** with police and collected a yellow paper bag which the 1<sup>st</sup> accused had left inside that house. Inside that paper bag were three men's shirts. **PW6** a niece to the deceased identified one of the shirts as the property of her uncle. **PW6** stated

***“I can identify them – cream white shirt and a checked shirt and the striped shirt. The one I identified is the stripped one as it was a gift from my cousin....”***

There was no peculiar mark on this shirt to identify it as belonging to the deceased. **PW6** did not give the name of the cousin who allegedly gave the deceased this shirt as a gift. The cousin who purchased the shirt was not called to confirm this fact. All in all there was nothing to prove that this shirt belonged to the deceased and to nobody else.

In his defence the 1<sup>st</sup> accused denied any involvement in the death of the deceased. As stated earlier the 1<sup>st</sup> accused admitted that he had been employed by the deceased as a night guard. He told the court that on the night of 6/2/2010 he reported on duty at 6.00pm. He escorted his boss (deceased) to give the other tenants their rental receipts and then he remained outside on duty. The only person who the 1<sup>st</sup> accused saw enter the house of the deceased was the 2<sup>nd</sup> accused who was his girlfriend.

The next morning at 6.30am the 1<sup>st</sup> accused alerted the deceased that he was leaving. The deceased came to the window and directed the 1<sup>st</sup> accused to clear the compound before he left. Thus by the time the 1<sup>st</sup> accused left the compound the deceased was alive and well. It was not until about 9.00am that the body of the deceased was found by other neighbours.

The defence raised by the 1<sup>st</sup> accused rings true. He had no motive or reason to murder his boss. The 1<sup>st</sup> accused told the court that the deceased treated him very well – like a son. It must be noted that after being told of the incident the 1<sup>st</sup> accused returned to the scene. He was there at all times with the police. He made no attempt to run away or to abscond. Indeed **PW11 CORPORAL OWUOTH** one of the first officers to arrive at the scene confirmed that

***“The gardener cum watchman was present. He was called Njenga – 1<sup>st</sup> accused”***

The police detained the 1<sup>st</sup> accused briefly and then released him. It was only much later that he was re-arrested. It is clear that even the police were unsure about the involvement of the 1<sup>st</sup> accused in the murder.

It is highly unlikely that the 1<sup>st</sup> accused would kill his boss and then hang around the same area for several days. He even continued working in the same compound as the guard after the death of the deceased. He only left when the deceased's sister released him to go home. This is not the behavior of a guilty person. The claim by the Investigating Officer that the 1<sup>st</sup> accused absconded holds no water. The 1<sup>st</sup> accused was traced and found at his rural home in Subukia. He explained that after the deceased's sister released him, he was jobless thus could not remain in Nakuru. He opted to go back to his home in Subukia. This is entirely reasonable. Why would anyone stay in town without a job?

I find that there is no evidence to link the 1<sup>st</sup> accused to the murder of the deceased. The only reason he was arrested is because he was the night watchman. I therefore acquit the 1<sup>st</sup> accused of this charge of murder.

With respect to the 2<sup>nd</sup> accused witnesses told the court that she was a tenant but was also a girlfriend to the deceased and often visited him in his house. The 1<sup>st</sup> accused told the court that on the night in question the 2<sup>nd</sup> accused came to the deceased's house at 6.30pm and spent the night there.

In her defence the 2<sup>nd</sup> accused denied knowing the deceased at all and denied being his tenant or his girlfriend. There would be no reason why the other witnesses would identify the 2<sup>nd</sup> accused as a tenant and a girlfriend of the deceased if this was not true. There is no evidence of any grudge these witnesses had against the 2<sup>nd</sup> accused and they had no reason to lie against her. **PW2** a mere child identified the 2<sup>nd</sup> accused by her name 'Joy'. There is no other way the child could have gotten to know the 2<sup>nd</sup> accused's name other than that she knew her well. Defence counsel did not in cross examination suggest to any of the witnesses that they were lying. These denials were only brought up during the defence. I find the defence of the 2<sup>nd</sup> accused to be a mere denial and it is dismissed as such.

**PW2** (the minor) told the court that on 7/2/2010 she had gone to draw water in the compound of the deceased who was the landlord. She saw the 2<sup>nd</sup> accused coming out of the house of the deceased carrying a TV tied in a lesso.

**PW1** also a neighbour confirms the testimony of the child. She stated that she too saw the 2<sup>nd</sup> accused leaving the house of the deceased on

the morning in question carrying a TV, DVD and radio tied in a lesso. **PW1** questioned the 2<sup>nd</sup> accused who retorted that the items belonged to her.

Both **PW1** and **PW2** identified the 2<sup>nd</sup> accused. They knew her well as a fellow tenant in the plot and as the girlfriend to the deceased. It must be remembered that the 1<sup>st</sup> accused who was the night watchman had stated that the only person who entered the deceased's house on that night was the 2<sup>nd</sup> accused. It is very telling that the 2<sup>nd</sup> accused is seen ferrying items out of the house of the deceased and shortly thereafter the deceased is found brutally murdered. Certainly the circumstantial evidence implicates 2<sup>nd</sup> accused as having been involved in that murder.

In **KARIUKI KARANJA Vs REPUBLIC [1986] KLR** it was held that

***“In order for circumstantial evidence to sustain a conviction it must point irresistibly to the accused and in order to justify the inference of guilt on such evidence, the inculpatory facts must be incompatible with innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt. The burden on proving facts justifying the drawing of that inference is on the prosecutor”.***

In **TEPER Vs REPUBLIC[1952] AC** 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 other co-existing circumstances which would weaken or destroy the inference”.***

The fact that the 2<sup>nd</sup> accused spent the night in the house of the deceased, the fact, that shortly before (barely an hour) the deceased's body is recovered the 2<sup>nd</sup> accused is seen carting away items from his house all point to a very strong likelihood that the 2<sup>nd</sup> accused was involved in the killing. **PW3 BERNARD OKAKA** told the court that he had been employed by the deceased as a shamba boy. **PW3** also identified the 2<sup>nd</sup> accused in the following terms

***“Joyce was one of the deceased's friends was also a tenant. She used to visit Njogu (deceased) in his house”.***

Under cross examination by defence counsel **PW3** confirms that

***“Joy came to the premises in early January, 2010. Besides being a tenant she was deceased girlfriend”.***

**PW3** went on to state that on 7/2/2010 after he received news of the murder of his employer he rushed to the compound. He entered the house and noticed that the Sanyo TV, DVD and radio were missing from the house. **PW3** confirms that

***“Those things were in the house the previous day”.***

Aside from the above stated facts, there is also evidence of recovery of certain blood-stained items of clothing inside the house of the 2<sup>nd</sup> accused.

**PW11** told the court that after viewing the scene at the house of the deceased, police went and searched the house of the 2<sup>nd</sup> accused who was one of the tenants. Inside the house they recovered

- Blood stained bed sheets
- T-shirt

Upon arrest police also recovered from the 2<sup>nd</sup> accused her brassiere which had blood stains. These items (together with others recovered from the house of the deceased) were all forwarded to the government chemist for analysis.

**PW13 ALBERT GATHURI** was the Government Analyst. He told the court that on 13/4/2010 he received various exhibits including a blood sample for the deceased as well as a blood sample of the 2<sup>nd</sup> accused for examination. **PW13** duly conducted a comparison and analysis of the items which he had received. His findings are tabulated in his report dated 7/7/2010 **P. exb 10**. The report indicated that the Blood Group of the deceased was found to be of Group 'O' whilst the blood group of 2<sup>nd</sup> accused was found to be of Group 'A'. The blood stained panga which was recovered in the house of the deceased was heavily stained with blood of group 'O'. It is likely that this was the panga used to attack and fatally injure the deceased.

Of note is that the bed sheet recovered from the house of the 2<sup>nd</sup> accused as well as the brassiere she was found wearing were both stained with blood of Group 'O'. How did blood of the deceased's blood group find its way into the house of 2<sup>nd</sup> accused and onto her clothing? This cannot be a mere coincidence. The only logical explanation for this set of facts is that the deceased's blood got onto the clothing of the 2<sup>nd</sup> accused in the course of his assault. The 2<sup>nd</sup> accused was seen ferrying items from the house of deceased to her house. There is every probability that the blood stained bed sheet was also ferried by the 2<sup>nd</sup> accused to her own house during that time.

As stated earlier the 2<sup>nd</sup> accused's defence was a blanket denial. She denied knowing the deceased and also denied being his tenant or girlfriend. The 2<sup>nd</sup> accused was trying to place as much distance as possible between herself and the deceased. I find no merit in her defence and the same is dismissed.

I was able to observe the demeanour of the 2<sup>nd</sup> accused as she gave her defence. She was shifty and evasive. It was clear to me that she was not telling the truth.

Further I note that the 2<sup>nd</sup> accused absconded after the incident. Her landlord/tenant is brutally murdered yet she vanishes from the scene and absconds from her home. This is clear evidence of a guilty mind.

All in all I am satisfied that the circumstantial evidence squarely implicates the 2<sup>nd</sup> accused in the murder of the deceased. I am satisfied that it was the 2<sup>nd</sup> accused who attacked and killed the deceased.

The last ingredient of the charge of murder is the *mens rea* or the mental element. In law *mens rea* is defined as '**malice aforethought**'. Section 206 of the Penal Code defines malice aforethought in the following terms

***"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"***

**PW7** the pathologist described in detail the severe cuts inflicted on the deceased. The severity of the attack was also quite clear from the photographs produced in court as exhibits. The witnesses described a horrific scene. Blood all over the floor and walls. In launching so vicious an assault the clear intention was to kill or cause to grievous harm to the deceased. I am satisfied that *mens rea* has been proved.

As a result I am satisfied that the charge of murder has been proved as against the 2<sup>nd</sup> accused. I accordingly enter a verdict of guilty and convict her of this charge.

**Dated in Nakuru this 22<sup>nd</sup> day of September, 2017.**

Mr. Ombati holding brief for Mr. Orege

**MAUREEN A. ODERO**

**JUDGE**