



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL CASE NO. 86 OF 2012

REPUBLIC.....STATE

VERSUS

FRANCIS MWANGI KAMAU.....ACCUSED

JUDGMENT

The accused **FRANCIS MWANGI KAMAU** faces a charge of **MURDER CONTRARY TO SECTION 203 as read with SECTION 204 OF THE PENAL CODE.**

The particulars of the charge were that

“On the 30th day of August, 2012 at Nairobi Village in Nakuru North District with Nakuru County, murdered GEOFFREY NG’ANG’A”

The accused entered a plea of ‘**Not Guilty**’ to the charge. His trial commenced on 6/5/2014 before **Hon. Justice Anyara Emuluke** (retired) who heard the evidence of the first four (4) prosecution witnesses. Following the transfer of the Honourable Judge to the Mombasa High Court, I took over the case and heard the remaining two (2) prosecution witnesses. A total of six witnesses testified on behalf of the prosecution.

PW2 JOSEPH MWANGI KIMANI told the court that on 10/8/2012 he left his house to visit a friend. **PW2** stayed with his friend whose name he gave as ‘**Kahuru**’ until 9.00am when he left to return to his house.

Near Jack Trading Centre, **PW2** says he heard some people exchanging angry words. **PW2** says he recognized the voices of Geoffrey Ng’ang’a (the deceased) and Mwangi (accused) whom **PW2** referred to as ‘**Dick**’. **PW2** formed the impression that they were quarrelling over money (a debt). He tried to move in to listen but accused asked him what he was searching for. **PW2** then hurriedly left and went home to sleep. The next day he heard that the body of the deceased had been recovered in a field of napier grass.

PW3 BETH WANGARI GATHUA was the mother of the deceased. She told the court that on 29/8/2012 she was working in her shamba with the deceased. After they returned home and had lunch, the deceased left with the accused. He did not return home that day. **PW3** told the court that the deceased was missing from 29/8/2012 to 1/9/2012 when she was informed that his body was found in a field of napier grass.

At the close of the prosecution case the accused was found to have a case to answer and was placed onto his defence. The accused gave sworn defence in which he denied any involvement in the murder of the deceased.

This court is now required to analyze the evidence on record to determine whether the charge of murder has been proved beyond all reasonable doubt as required by law.

The of offence of murder is defined as follows by Section 203 of the Penal Code Cap 63 Laws of Kenya

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

From this definition derives the three crucial ingredients of murder all of which require proof beyond reasonable doubt.

- (i) Proof of the fact as well as the cause of death of the deceased.
- (ii) Proof that the deceased met his death due to an unlawful act or omission on the part of the accused
- (iii) Proof that said unlawful act or omission was committed with malice aforethought.

In this case the fact of the deceased's death cannot be in any doubt **PW5 MRS. HILDA MUTHONI MUKUI** told the court that on 1/9/2012 at about 3.00pm the workers informed her that they had found a dead body in her shamba where she had sent them to cut napier grass. **PW5** alerted the chief and police later came and removed the dead body to the mortuary.

PW3 the mother of the deceased confirms having seen the dead body of her son. **PW4 SOLOMON KITAIBU GATUVA** an uncle to the deceased told the court that on 4/9/2012 he went to the Nakuru Municipality Mortuary where he identified the body of the deceased to the doctor who performed the autopsy. **PW3** and **PW4** who both knew the deceased well gave his name as '**Geoffrey Ng'ang'a**'.

PW1 DR. TITUS NGULUNGU a consultant pathologist based at Nakuru PGH conducted the autopsy on the body of the deceased. **PW1** told the court that upon examination of the body he noted there was a '**massive sub-scalp haematoma**' he also noted that the head was swollen. The tongue has bite marks and lungs had collapsed. The pathologist concluded that the cause of death was '**a combination of head injury with asphyxia due to multiple blunt trauma force with smothering in keeping with homicide**'. **PW1** filled and signed the post-mortem report which he produced in court as an exhibit **P. exb 1**.

This was expert medical opinion evidence and was neither challenged nor controverted by the defence. As such I am satisfied that the cause of the deceased's death has been proved beyond reasonable doubt.

Having proved the fact as well as the cause of death the prosecution is required to go further and adduce evidence to show that it was the accused who fatally assaulted the deceased. The '**actus reus**' of the offence of murder must be proved as against the accused person.

There was no witness who saw the accused attack and kill the deceased. **PW3** the mother of the deceased only told the court that on 29/8/2012 her son left their home in the company of the accused. She had no idea where the two went or what occurred after they left her home. All she can say is that the deceased was missing until 1/9/2012 when the body was found in a field of napier grass.

PW2 was the only witness who claims to have seen the deceased in the company of the accused. **PW2** told the court that on 30/8/2012 at 9.00pm he was on his way home when he heard voices raised in argument. **PW2** stated that he recognized the two voices as those of the accused and deceased. **PW2** did not know why the two were arguing but he suspected that the argument was over money. **PW3** did not try to observe the events but hurried on his way home.

PW2 did not see the accused and deceased fighting and he never saw the accused assault the deceased in any manner whatsoever. Indeed under cross-examination **PW2** says

"When I left they were not fighting. All I got is an impression they were quarrelling over what I thought was a debt. I may not have mentioned 'money' but it was a hot quarrel"

The prosecution sought to rely on this evidence of **PW2** that he heard the accused and deceased quarrelling as a way to implicate the accused in the death of the deceased. The fact that the two were heard quarreling cannot be taken to mean that it was the accused who killed the deceased.

PW6, the investigating officer told the court that he found the accused liable for the death of the deceased merely because the deceased was last seen alive in the company of the accused. The fact that accused was last seen in the company of the deceased on the night that the latter went missing is not proof of his guilt. In any event according to **PW4** there were four (4) people at the scene where he met accused and deceased. Who were these other two men and why have they not been similarly implicated. Where did these two men go to and what role if any did they play in the death of the deceased. These are critical questions which remain unanswered.

PW6 was the officer who investigated the case. However he was unable to tell the court precisely what role accused played in the murder of the deceased neither was he able to explain exactly why he decided to charge the accused. I noted as he gave evidence that **PW6** was unsure of the facts of the case and several times had to refer to his written notes. It is clear to me that even as the investigating officer **PW6** was not certain that accused had admitted any offence.

PW6 told the court that he charged the accused because he was the last person seen in the company of the deceased. As this court has stated earlier this fact on its own does not make the accused guilty of any offence. The law requires that the prosecution prove its case beyond reasonable doubt. At no time does this burden ever shift to require that the accused explain himself.

PW6 further admitted that the accused was arrested for assault yet in the same breath **PW6** says

"I do not know who he is alleged to have assaulted"

In his evidence **PW6** states that the mother of the deceased told him that it was the accused who had killed her son yet the mother of the deceased who testified in court as **PW3** made no such statement in her evidence to the court. **PW3** stated that she did not know who had killed her son. Thus the testimony of **PW6** contradicts that of **PW3** in very material aspects of the case.

Finally it is pertinent to note that the witnesses have all mentioned one '**Kagunda**' who was also a suspect but who managed to escape and remains at large. The fact that the person saw fit to run away implies that he may have had a hand in death of the deceased.

PW5 in whose farm the body of the deceased was recovered testified that it was her workers who found the body. None of these workers was called as a witness in the case.

Finally, I find that there is no evidence to prove that it was the accused who killed the deceased. The evidence against the accused amounts to nothing more than innuendo and suspicion. If the accused elected to keep silent in his defence the evidence on record would not suffice to support a conviction. I find that no prima facie case has been proved and I acquit the accused of murder. The accused is to be set at liberty forthwith unless he is otherwise lawfully held.

Dated and delivered in Nakuru this 19th day of October, 2017.

Ms Chemgetich holding brief for Ms Wangure

Mr. Chigiti for DPP

Maureen A. Odero

Judge