



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
HIGH COURT CRIMINAL CASE NO 109 OF 2009
REPUBLIC.....PROSECUTOR
VERSUS
EDWARD MURIUKI NYAGA.....ACCUSED
JUDGMENT

BACKGROUND

1. The accused **EDWARD MURIUKI NYAGA** was charged with the offence of murder contrary to **Section 203** as read with **Section 204** of the Penal Code the particulars of which were that between 26th and 27th day of July, 2009 at Mwhoko estate in the then Nairobi North District within the then Nairobi Province murdered **PATRICK NDUNGU KARIUKI**.
2. He first appeared before Lesit J on 17/12/2009 and on 23/12/2009 he took plea before Wendo J when a plea of not guilty was entered and the same remanded in custody as the law then did not allow for bond in respect of capital offences.
3. On 9/3/2011 his trial commenced before Ombija J (as he then was) who heard the evidence of eleven (11) prosecution witnesses. On 30/1/2013 the matter was placed before Korir J before being taken over again by Ombija J for the hearing of PW12, PW13, PW14 before retiring from the Judiciary.
4. In the meantime the accused who was initially being represented by Mr. Wandungu and Mokaya advocates also changed representation to Mr. Njanja Advocate and on 20/6/2016 Directions were given in this matter under the provisions of **Section 201(1)** and **Section 200** of CPC for the matter to proceed from where it had reached for trial before me. On 21/9/2016 the trial proceeded before me when I took the evidence of PW15 and placed the accused on his defence who gave a sworn defence.
5. For record purposes it must be stated that I did not have the advantage of hearing and seeing fourteen (14) prosecution witnesses but have had the advantage of reading and analyzing their evidence for the purposes of this judgment **Section 200** and **201** of Criminal Procedure Code having been complied with.

PROSECUTION CASE

6. It was the prosecution case that the deceased **PATRICK NDUNGU KARIUKI** who was a businessman dealing in scrap metals and gemstones went missing on 21/7/2009 and his body later on discovered on the night of 26th/27th July at Mwhoko estate.

7. According to the evidence of **PW1 MWANGI NDUNGU** son of the deceased he last saw him on 17/7/2009 at about 10.00 a.m. and on 21/7/2009 he received a cell phone call from one Madam Jean who was working with the deceased with information that the same had been arrested. On 22/7/2009 he travelled to Nairobi in the company of his mother and brother and met the said Madam Jean at Kasarani and reported that the deceased who was then using mobile phone No. 0728 883 839 was missing. They commenced a search at various police stations and mortuaries around Nairobi to no avail.

8. It was his further evidence that on 7/9/2009 he received an sms from his father's mobile phone requesting for assistance to pay Kshs.280,000/- and that he was not allowed to use phones. In a further message he gave the cell phone number of the person owed money as 0724 605 025. On 12/9/2009 he received further sms from his father's number 0728 888 839. He kept on responding to the said sms despite that fact that they had discovered the body of the deceased at the city mortuary with the last sms being received on 22/10/2009 and that when the accused was arrested he stopped receiving sms.

9. It was his evidence that one Daudi who was known to Madam Jean and was allegedly in partnership with his father called his Aunt Wangui Anne and reported that he had been arrested together with the deceased and gave the number 0715 805 447 for communication alleging that the money belonged to a D.O. He reported the matter to the police and gave the cell phone No. 0729 104 562 which the said Daudi was using. They subsequently visited Equity Bank and found that the deceased account had been depleted save for a balance of Kshs.120,000/-. It was at Equity Bank where he saw the picture of the accused from CCTV.

10. **PW2 GRACE GATHONI** testified that she was living with the deceased as wife and husband at Kayole and that on 31/7/2009 she was with the deceased at Ngara when the same told him that Daudi had called him from Town requesting for fare to go to Embu, the deceased left for Town at 6.30 p.m. but did not come back home. She tried calling the deceased phone thereafter and there was no answer. She corroborated the evidence of PW1 that Madam Jean had informed him that the deceased was arrested by the police and they went to the police stations including Central, Kamukunji and Kasarani and found that the deceased had not been booked there. They were further directed by Madam Jean to Gilgil Police Station but the deceased was not there.

11. It was her further evidence that on 25/7/2009 she went to Equity Bank to check on her ATM having earlier given the deceased her card to withdraw some money and when she checked on her account balance she was shocked to find a balance of Kshs.14,000/-. She was advised to go to Jivanjee Garden Branch where she had opened the account and was advised to go to Equity Head Office where CCTV showed the accused withdrawing the money and that when the accused was arrested she positively identified him on 3/8/2009. She was able to identify the body of the deceased who had been found dead at Mwioko area at the city mortuary. It was her evidence that whereas Daudi was a friend of the deceased, the accused was not. Under cross examination she stated that the person who was found with the mobile phone of the deceased said that it was sold to him by Daudi.

12. **PW3 TERESIA WAIRIMU NDUNGU** the first wife of the deceased confirmed that he was dealing with gemstone and had a hardware at Kariokor and that she last saw him alive on 17/7/2009 when he visited his rural home in Muranga. She corroborated the evidence of PW1 that on 24/7/2009 they went to Equity Bank at Tea Room where the deceased account was and were referred to Head Office where CCTV cameras confirmed that the accused had been withdrawing money from the deceased ATM Bank Account using his ATM Card from 22/7/2009 at Githurai, Tea room and Ngara. They were advised to close the account and on 26/27 the body of the deceased was found at Kahawa Sukari. It was her further evidence that someone was later arrested with the handset of the deceased who according to PW2 stated that it was sold to him by Daudi.

13. **PW4 ELLY MACHARIA NDUNGU** a son of the deceased testified that on 20/7/2009 he went with the deceased in Town where they purchased items for his building project and that on 22/7/2009 PW1 Called him with information that the deceased had been hijacked. He corroborated the evidence of the other witnesses on the withdrawal from the deceased account and how the accused was identified from the CCTV Cameras of the Bank.

14. **PW5 JOSEPH NJAGE KARIRAGIA** testified that in July 2009 his daughter **EDITH NJOKI (PW9)** went to his home with the accused who wanted someone to sell him mercury and after two weeks a lady named Emily Gichuku informed him that she knew one Daudi a broker in Embu who dealt in mercury. He thereafter met Edith, the wife of the accused, Daudi and the deceased who was said to be the owner of the mercury who demanded a payment of Kshs.150,000/- of which she had only Kshs.80,000/- she stated that her husband the accused was in South Africa and they agreed to go to Nairobi where the deceased would get his balance.

15. **PW6 EMILY WANJIKU NJERI** testified that she knew Daudi as a seller of cattle and land. It was her evidence that she knew the deceased too who told them that he was selling mercury from West Pokot. She was later called by the wife of the deceased who informed her that the deceased had disappeared she further stated that (PW5) later informed her that the accused had stated that he would kill all of them since the substance which was sold to his wife was not mercury. She was later on arrested together with PW6 but was subsequently released.

16. **PW7 DR. NJAU MUNAMI** conducted post mortem on the body of the deceased who had multiple fractures on the face and head, bruises on the chest and multiple stab wounds on the neck caused by a sharp object while **PW8 DR. ZEPHANIA KAMAU** examined the accused who had a small scan on the upper part of the left side of the head twelve days old at the time and found him fit to stand trial.

17. **PW9 EDITH NJOKI MURIUKI** confirmed knowing the accused who was working with the Army and belonged to the same clan with her husband. It was her evidence that the accused had an interest in touring the place called NTHAGAIYA and wanted to know whether he could get mercury. When PW5 later on informed her that he had found somebody who could get the needed mercury the accused introduced her to his wife. It was her evidence that they met in Embu where her father introduced them to PW6 who introduced them to Daudi and subsequently introduced the deceased and that at the time of the transaction she was told to leave the group in the hotel, she was later on called by the wife of the accused who said she did not have enough money and was therefore going to Nairobi with Daudi and the deceased. It was her evidence that about one year later somebody called her and said he was the accused and that he would kill all of them. It was her evidence that she knew the voice of the accused.

18. **PW10 No. 87465 PC FREDRICK OWINO** confirmed having received the report on the disappearance of the deceased on 22/7/2009 on 27/7/2009. He was informed by DCIO that the body had been discovered in Kahawa Sukari Area and on 4/5/8/2009 attended the post mortem.

19. **PW11 CHRISTOPHER WAFULA** a security officer with Equity Bank testified on how ATM system is operated and that the accused posed as another entered the pin and selected withdrawal option since there were sufficient funds on the account of the deceased and withdraw the limit of Kshs.20,000/- as follows:-

- (i) On 21/7/2009 - Kshs.1500 at Ngara ATM
- (ii) On 22/7/2009 - Kshs.20,000/- at Githurai Branch
- (iii) On 23/7/2009 - Kshs.20,000/- at Embu Branch
- (iv) On 24/7/2009 - Kshs.20,000/- at Githurai ATM
- (v) On 25/7/2009 - Kshs.20,000/- at Tea Room Branch
- (vi) On 26/7/2009 - Kshs.20,000/- at Tea Room
- (vii) On 27/7/2009 - Kshs.20,000/- at Ngara Branch.

20. It was his evidence that the image of the person who withdrew the money between 22/7/2009 – 27/7/2009 was captured in their camera which was the image of the accused who was not the account

holder as per the bank records. It was his evidence that he had shown four images from Embu ATM on 23/7/2009 and withdrawal for 22/7/2009 and that the rest of the images were available.

21. **PW12 JANE WANJIKU KIHIA** testified that on 21/7/2009 at 8.00 p.m. she called the deceased who she wanted to give information with regard to a self help group called WARM HEART OF KENYA PRECIOUS gemstone and the deceased did not go to meet her. He later on called her at 8.30 p.m. but before they could talk he heard him say that he had been abducted by three people. Later on the deceased sent her an sms to the effect that he was at the police which information she later gave to the sons of the deceased whom she met and went with to Kasarani police station where they reported the matter. While at the police station a stranger called her from cell phone No. 0720 788 186 which she headed over to the police. She accompanied the family to Equity Bank and on 3/8/2009 identified the body at the city mortuary. It was her evidence that the deceased was dealing with gemstones as was known to **WARM HEART OF KENYA PRECIOUS GEMSTONE INITIATIVE** where she was the secretary of the Group.

22. Under cross examination she stated that the deceased had shown them a place in Mbere where they were to carry out mining activities and that the group had contributed money for the said project that was never to be. **PW13 ROBERT NJOYA KIHARA** stated that on 20/8/2009 his cellphone had a problem of memory so the person he had taken it for repair gave him another cellphone Nokia 1600 in exchange with him upon payment of Kshs.1,200/- and a week later the said mobile phone was stolen from his house and report vide OB No. 38/30/9/2009 he later on went to the said repairer Samuel Ndungu who gave him another cell phone Nokia 1214 for Kshs.1900 without any documentation.

23. **PW14 SAMUEL NDUNGU NGURURI** corroborated the evidence of PW13 and stated further that on 21/8/2009 one John Ndunge who had a problem with bus fare surrendered his cell phone Nokia 1600 for a sum of Kshs.1000/- and he did not come for it which he later gave PW13 leading to his arrest. **PW8 DR. ZEPHANIA KAMAU** examined the accused who was found fit to stand trial and at the time of examination had a small scan on the upper part of the left side of the back of the head.

24. **PW15 CP MAXWEL OTIENO** the investigating officer in this matter stated that he received a report on the deceased who had gone missing from his wife and a business partner. He commenced investigations and confirmed withdrawal for the Bank account of the deceased by the accused person. He stated that PW9 confirmed to him that the accused had approached her to assist him get Red mercury and she introduced him to her father PW5 who eventually introduced him to the deceased who sold the alleged red mercury to him through his wife for which Kshs.250,000/- was and instructions given on how to handle the mercury. Unfortunately the bottle of mercury cracked.

25. It was his evidence that the accused paid a total of Kshs.670,000/- to the deceased only to learn that he had been conned leading him to threaten PW9 who had introduced him to the deceased that he would kill her and her father. He further confirmed that the sim card of the deceased had at one time been inserted into the handset belonging to the accused on three occasions between 19th August, 31st August and 2nd September 2009 after the disappearance of the deceased and that the deceased was murdered the day his bank account was blocked. He stated that upon arrest the accused did not give a satisfactory explanation on how he got the ATM Card of the deceased and that having lost him money he was out to recover the same from the deceased.

26. **PW16 MARTIN WEKESA** produced records in respect of telephone communication between the parties herein which he produced in evidence. It was his evidence that on 20/8/2009 the deceased handset was paired with the accused cell phone No. 0720 006 458, this was also the case on 1/9/2009. It was also his evidence that on 18/7/09 the deceased called the accused.

27. When put on his defence the accused gave sworn testimony and stated that he used to work with Kenya Defence Force and that he had never seen the deceased neither did he know him. He further stated that he did not know PW5 and PW6. He stated on oath that he knew one Hannington Mbaka alias Daudi who was his neighbour in his rural home and that it is the said Daudi who asked him to assist him withdraw money using the deceased ATM Card who was allegedly in police custody and that having

shown him how to do so they parted way. Under cross examination he stated that the card had the name of the holder but he was not interested in it. It was his evidence that he only used the card twice and that he was given the pin by one Mbaka alias Daudi.

SUBMISSIONS

28. At the close of the defence case, it was submitted by the prosecution that the evidence connecting the accused to the deceased death was the deceased ATM Card which clearly shows that the accused was in possession of the same after the deceased died. It was submitted that the said evidence placed the accused with the deceased prior that it is when he went missing and during or when the fatal injuries were inflicted on him. It was submitted that the doctrine of recent possession permit in inference of guilt on the accused person the accused having admitted that he was in possession of the deceased ATM Card. It was submitted that the accused was untruthful in his defence and that his conduct and lies gave evidence to the prosecution case from which the case of **REPUBLIC v LUCAS (1981) IQB 720** was relied upon.

29. On behalf of the defence it was submitted that the prosecution case was purely on circumstantial evidence and that the prosecution did not meet the test set out in the cases of **REPUBLIC v ARAP KOSKEI & ANOTHER (1949) 16 EACA 135** and **KIMAU v REPUBLIC (2002) 1KLR**. It was further submitted that the prosecution failed to call all essential witnesses including the wife of the accused to establish its case from which the case of **BUKENYA v UGANDA (1972) EA 549** was relied upon. It was submitted that the accused was an innocent victim who was naïve and trusted a person known to him to assist in making the ATM withdrawals without knowing that the owner of the card was either dead or involved in a murder plot.

ANALYSIS AND DETERMINATION

30. For the prosecution to prove a charge of murder as provided for under Section 203 of the penal code the following ingredients must be established beyond reasonable doubt by the prosecution:-

- a) The fact and the cause of death.
- b) Proof that the said death was as a result of unlawful act or omission on the part of the accused person.
- c) That the said unlawful act or omission was committed with malice aforethought.

31. Malice aforethought has been defined by the Court of Appeal in **NZUKI v REPUBLIC (1993) KLR 171** as quoted in **REPUBLIC v MARTIN KINYUA NANCY EMBU HIGH COURT CRIMINAL CASE NO. 14 OF 2011**.

- *Intention to cause death*
- *Intention to cause grievous bodily harm.*
- *Where accused knows that there is a risk that death or grievous bodily harm will ensue from his acts and commits them without lawful excuse. It does not matter whether the accused desires those to ensue or not. The mere fact that the accused conduct is done in the knowledge that grievous harm is likely or highly likely to ensue from his conduct is not by itself enough to convert a homicide into a crime of murder.”*

32. The fact and the cause of death of the deceased herein is not in dispute. From the evidence tendered before court the deceased was last seen by **PW1 MWANGI NDUNGU** his son on 17th July, 2009. On 21/7/2009 he received a cell phone call from **PW12 JANE WANJIKU KIHIA** better known to him as Madam Jean who was working with the deceased who allegedly told him that she had received a report that the deceased who was to meet with one Daudi had been arrested. On 22/7/2009 the same was reported as a missing person only for his body to be found at the city mortuary on 3/8/2009 having been found dead at Mwiuhoko area of Githurai. The body was identified by **PW2 GRACE GATHONI** his second wife, **PW3 TERESIA WAIRIMU NDUNGU** his first wife.

33. **PW7 DR NJAU** conducted post mortem examination on the body of the deceased who had multiple fractures on the face, head and front neck. He had bruises on the chest and multiple stab wounds on the neck and as a result thereof confirmed the cause of death to be stab wound and blunt force trauma. I therefore find and hold that the prosecution has proved beyond any reasonable doubt the fact and cause of death of the deceased.

34. On whether the said death was caused by unlawful act or omission on the part of the accused person as submitted by the defence the prosecution case against the accused person is based purely on circumstantial evidence. There is no eye witness who saw the accused commit the unlawful act that caused the death of the deceased person. However from the evidence tendered before the court, the following facts are not disputed, that the accused person used the deceased ATM card to make withdrawal from the deceased Bank Account with Equity bank. This was confirmed by the evidence of **PW11 CHRISTOPHER WAFULA** a security officer with Equity Bank who confirmed that the deceased held an account with the Bank and that as at 22/7/2009 the account had a credit balance of Kshs.220,941 from which a sum of Kshs.20,000 was withdrawn six (6) times from the following ATM points:-

- a) 21/7/2009 - Kshs.1500/- at Ngara ATM No. 3.
- b) 22/7/2009 - Kshs.20,000/- at Githurai Branch ATM
- c) 22/7/2009 - Kshs.20,000/- at Embu Branch ATM No. 3
- d) 24/7/2009 - Kshs.20,000/- at Tea Room Branch ATM No. 5
- e) 26/7/2009 - Kshs.20,000/- at Tea Room ATM No. 5
- f) 27/7/2009 - Kshs.20,000/- at Ngara ATM No.3.

35. It was his evidence that after the 22nd July, 2009 the transactions from the deceased account were Kshs.20,000/- which was the maximum allowed for six days and that he cameras captured the image of the accused person as the person who operated the account of the deceased during this period of time. The court was able to view the transactions herein in court and in cross examination by Mr. Njuguna for the accused person, the witness confirmed that he had produced four images for Embu ATM on 23/7/2009 and withdrawal for 22/7/2009 and that the rest of the images were available and could be produced on request. There is also the evidence of PW2 that her account whose ATM Card she had given the deceased was also withdrawn from leaving only a balance of Kshs.14,000.

36. When put on his defence the accused stated that he only operated the said account at the request of one Daudi alias Hannigtone Mbaka, the question which begs to be answered is as to why the accused would assist the said Daudi or Hannington Mbaka withdraw the money from the account of the deceased both at Nairobi and Embu? And why it was only the image of the accused which was captured by the CCTV if he was with the said Mbaka at the time and place of withdrawal and alleged in his defence. The accused explanation does not hold water in view of the prosecution witnesses' evidence.

37. The evidence of the withdrawal from the account of the deceased had been weighted against the evidence of **PW5 JOSEPH NJAGE KARIRAGIA** whose testimony was that is daughter one **EDITH NJOKI PW9** who was married in the same area where the accused came from and who knew the accused as working in the armed forces in Nairobi brought the accused who he was able to identify in court to him with a request that he wanted someone who could sell him mercury. He asked around and one lady called **EMILLY GICHUKU** identified a person in Embu and that she agreed to take the accused to the said Daudi.

38. It was his evidence that the said **EDITH** thereafter came with the wife of the deceased whom they took to the said Daudi where they met together with the deceased who demanded a payment of Kshs.150,000/- out of which she paid Kshs.80,000 to the deceased who he went with her to Nairobi for the balance. It was his evidence that **PW9** later reported to him that a voice resembling the accused had

warned her that he would kill all of them. This evidence was corroborated by **PW6 EMILY WANJIKU NJERU** who had known the deceased who confirmed that he was selling mercury from West Pokot.

39. PW9 confirmed that she met with the accused who was interested in buying mercury and that the accused subsequently introduced her to his wife for the purposes of buying the said mercury on his behalf once her father had identified a source which turned out to be the deceased. From the evidence tendered before the court which I believe the accused person was interested in buying mercury which he paid for through his wife and from the evidence of **PW15 SP MAXWEL OTIENO** it turned out that the said mercury was not genuine after the accused had paid a total of Kshs.670,000/- and to recover his loss the accused got the deceased whose sim card he had inserted into his handset three times on 19th August, 2009, 31/8/2009 and 2/9/2009 and that the 27/7/2009 when the accused account was blocked by the Bank so that the accused was unable to withdraw the money therefrom, is the date when the deceased was murdered and his body found at Mwhoko Area.

40. I find and hold that the circumstantial evidence tendered herein puts the accused with the deceased and it is clear that the accused held the deceased either alone or with one Mbaka Hannington alias Daudi who has not been traced to date in an attempt to recover the money he had lost when he was conned out of the same. I am unable to believe the defence of the accused that he did not have any connection with the deceased against all the prosecution witnesses who were able to identify the accused and put him with the deceased. This is further confirmed by the call data records which confirmed that the accused had been in communication with the deceased and that the deceased handset was used by the accused when he inserted his sim card therein and that the sms which were being sent to the family of the deceased using different cell phone number demanding for money stopped immediately the accused was arrested confirming that the accused had an hand in the sending of the said sms.

41. I further find that failure to call the wife of the deceased who had recorded a statement with the investigating officer confirming the loss of money as a witness is not fatal since though she is a competent witness the same can never be compelled to testify against the husband. It is my finding that having lost money, the accused had the intention to cause death or harm to the deceased in his attempt to recover the money he had been conned of. I therefore find and hold that the circumstantial evidence tendered herein irresistibly points to the guilt of the accused person to the exclusion of everybody else and that he was either in the joint enterprise with one Daudi better known as Hannington Mbaka or the same might have also faced the same fate as the deceased leading to his disappearance.

42. I am therefore satisfied and find that the prosecution has proved beyond any reasonable doubt that the accused with malice aforethought caused the unlawful death of the deceased and therefore find the same guilty of the murder of **PATRICK NDUNGU KARIUKI** as charged and convict the same accordingly.

DATED, SIGNED and DELIVERED at Nairobi this 20th day of **September**, 2017

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J. WAKIAGA

JUDGE

In the presence of:-

Mr. Meroka for the State

Mr. Businde for Njanja for the Accused

Accused present

Tabitha court clerk