



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL CASE NO. 42 OF 2008

REPUBLIC

VERSUS

GEOFFREY CHOMBA MUTHONI.....ACCUSED

JUDGMENT

The accused was charged with murder contrary to **section 203** as read with **section 204** of the **Penal Code (cap.63)**. The particulars were that on 4th day of July, 2008 at Hotpot area in Nyeri district of the central province he murdered Lydia Wanjiru Wachira (herein “the deceased”).

The state called 13 witnesses in support of its case against the accused.

A K (PW1), aged 10, gave unsworn statement after the court satisfied itself that he neither understood the nature or the meaning of an oath; he stated that on 4th of July, 2008 at about 3 PM he came back home from school. As he opened the door of their house, a man held his leg and started stabbing him with a metal rod. He stabbed him on the neck, stomach, chest and even eyes. The stranger threw him under the bed thinking that he was dead. He also saw their house girl lying on the floor, in the sitting room, bleeding.

The assailant went back to the deceased and stabbed her again before he carried her threw her under the bed where **A (PW1)** was lying. **A** escaped through the backdoor when the attacker went to his parents’ bedroom. Once he got out of the gate he met a neighbour, whom he identified as **Baba Muriuki (PW2)**, cutting grass. When he informed him what had happened, Muriuki proceeded with him the road where they boarded a matatu to Karatina. They met traffic police officers along the way and informed them of the attack. They then went to Karatina DEB Primary school where **A’s** mother (**PW3**) was a teacher and informed her of the attack. **A** was then rushed to hospital. He testified that he did not know the assailant before but pointed him out in court as the person who attacked him and killed the deceased.

John Mwangi Muriuki (PW2) testified that indeed **A(PW1)** found him cutting grass around the house of one Julius Muriuki on 4th July, 2008 at about 4.00 PM. The house was about 20 metres from **A’s** family house. He noticed that **A** was bleeding. He told him that a man had stabbed him and also killed the deceased. Muriuki took **A** to Karatina but while on the way, they met traffic police officers who were manning a road block; he informed them of the attack and proceeded to Karatina where he found **A’s** mother at Karatina DEB primary school. He and two teachers from that school took **A** to hospital; while there, they got information that the deceased had died.

A’s mother, **Emily Njeri Mburu (PW3)**, testified and confirmed that **A** was her first-born child and that on 4th July, 2008 he, together with her other child accompanied her to school where she was a teacher; **A**

was a pupil in class three in that same school. She left the deceased behind at home together with her five-month-old baby. A left for home at about 3.30PM but came back an hour later accompanied by Muriuki (PW2). His clothes were blood-stained and he was bleeding from the neck and eyes. He told her that he had been stabbed by a “thief” and that their house girl had been killed. Her colleagues, Ms Maina and Mrs Kariuki took A to hospital as Emily rushed home accompanied by policemen and a male teacher. Her home was about 2 kilometres away.

The front house’s front door was opened but the backdoor was locked from inside. When they entered the house, they noticed that blood was spilt in the sitting room. The deceased’s body was found underneath A’s bed. The master bedroom was locked from inside. Emily noticed that there was somebody in the bedroom when she peeped through the window. The police officers asked for reinforcement and ordered him to open the door. He opened the door and came out; it is then that Emily realised it was the accused.

Emily testified that she had known the accused for nine years. She knew him as the son of the person who sold her husband land in 1999. The land was in Kirinyaga and according to her, the sale was concluded without any controversy.

She and the police officers found a metal rod and arrows on the table in the sitting room; the metal rod was blood-stained. She also found a spear in the deceased’s bedroom but on the following day. The police took away the deceased’s body. They also carried the weapons. Her baby was found unharmed.

Godfrey Wahome Wambugu (PW6) testified that on 4th July, 2008 at about 4:30 PM he was driving along Kagocho-Karatina Road when Emily called him and informed him her home had been invaded by thugs. He then called a police officer, whom he identified as Ndegwa and together they drove to Emily’s home. They found a crowd of people at the home. He peeped through the window and saw a man in her house. He opened the door after the police ordered him to. He was then immediately arrested. That man was the accused. It was this witness who found Emily’s child. He is also the one who saw the deceased’s body under the bed. He testified that the house was getting dark because the accused had disconnected power; the accused himself told him that he had done this by removing the main fuse from the electricity meter.

Police Constable Christopher Ndegwa (PW7) testified and confirmed that **Wambugu (PW7)** called him on 4th of July 2008 at about 4:30 PM and informed him about the attack at Emily’s home. He was with his colleague police Constable Mwambura walking from Karatina police station towards Karatina town. Ndegwa (PW7) came in his vehicle and together they drove to Emily’s home. They found other police officers at the home. He testified that it was him that ordered the accused person to open the door. He handcuffed him when he opened the door and came out. The accused told him that he had killed two people and in fact led them to where he had hidden their bodies. The police officers saw the deceased’s body under a bed. It had deep cut wounds on the chest. The officer also recovered arrows next to the house and a metal rod on the table. The accused told him that he used the metal rod to murder the deceased. He also showed the officer where he had hidden the fuse. Apart from the arrows, there was also a spear that was recovered the day after the murder. This officer collected it from Emily(PW3).

According to this witness, the accused told him that he wanted to eliminate Emily’s entire family because it had purchased the accused person’s family land.

Emily’s husband, **Julius Muriuki Kabogo (PW4)** testified that in 1999, he bought an acre of land in Kirinyaga from **Loice Murinda (PW 10)**. After this transaction, he got to know her three sons who included the accused person. On 4th July, 2008, at about 5.00PM while he was at Meru where he worked, the accused called him on phone and told him that there were people who wanted to kill him. He asked for the title. He told this witness that he had killed his son together with his house girl. This witness then contacted his wife but they could not communicate since she could not talk. He, however communicated with someone who was with his wife. He went straight to hospital when he arrived and found his son, A admitted there.

Police Constable Erick Otieno (PW8) testified that on 4th of July 2008 at about 4 PM he was manning a

roadblock near Karatina town when a motorist driving a Nissan matatu stopped and asked him to talk to A. It was his evidence that A was bleeding profusely on the left side of the chest and he told him that he had been attacked by a stranger who had also killed his aunt; he needed the officer's help to rescue his infant brother who was still in the house. The police officer asked the motorist take A to hospital for treatment. Just before he left Emily arrived and together they drove to their home. This officer was the first police officer to arrive at the scene. He testified that he found a body, half naked, lying on the floor. The master bedroom was locked from inside and when he peeped through the window he saw somebody inside the bedroom. He called the officer in charge of Karatina police station who responded joined him with more officers. The accused person was arrested when he surrendered.

The scenes of crime officer corporal **John Mugo (PW9)** testified that when he went to Emily's house, he found the body of the deceased hidden under the bed in one of the rooms; he noticed that she had sustained a deep cut wound on the stomach; he also recovered a sharp metal bar and some arrows on the table; the officer took photographs of the scene and the deceased's body; he presented these photographs in court as evidence.

The accused person's mother, **Loise Muthoni (PW10)** confirmed that she had sold part of her land to Julius Muriuki(PW4). As at the time she sold the land the accused person was still a student in school and he did not have any problem with the transaction. He also had no problem with the Julius Muriuki who engaged him as a casual labourer apparently on the same land he had purchased from his mother.

Dr Paul Kimathi (PW11) testified and confirmed that a post-mortem was done on the body of the deceased to ascertain the cause of her death. It was established that she had sustained bruises on the head and neck and left collarbone and the ribs. The cause of death was established to be penetrating stab wounds on the chest and abdomen. The probable type of weapon used was a knife. The deceased's brother, **Richard Maina (PW5)**, confirmed that he witnessed the postmortem on the deceased's body; he confirmed the body to that of her sister.

The accused person's confession was taken by **Hon Lucy Mbugua (PW12)** who was the acting Principal Magistrate at Karatina Law Courts. She testified that on 7th of July 2008 the accused person was brought to her by two police officers from Karatina police station. They informed her that the accused person wanted to record a confession regarding the murder of the deceased and assault on A. One of the officers was carrying a metal rod which he placed against the wall in the magistrate's chambers. The accused confirmed to the magistrate that he wanted to tell her what happened on 4th July, 2008. He preferred to use Kikuyu language and therefore the learned magistrate called the court clerk, whom she identified as **Susan Waiganjo (PW12)** to translate it to Swahili. However, the accused narrated most of his confession in Swahili language. He stated that on 4th of July 2008 he had gone to the home of **Julius Muriuki (PW4)** with the intention of killing his entire family. When a house-girl appeared with a small baby he stabbed her in the back and on the neck. He also stabbed Muriuki's son using the same rod when came back home. When he was sure that the two of them were dead, he threw their bodies under the bed. He then started looking for the title deed, apparently of the land he had purchased from his mother, in Muriuki's house. However, members of the public and police officer arrived before he found it; he thus resigned to himself and waited for his fate. When he was arrested, he informed the police officers that bodies of the people he had killed were under the bed. He signed the confession; the magistrate and the court clerk also signed it. The magistrate produced a copy of the confession since the original version had been produced in the magistrates' court during the accused person's trial for the offence of attempted murder.

The court clerk, **Susan Waiganjo (PW13)** testified that on 7th of July, 2008 she was called in the magistrate's chambers to do the interpretation of the accused person's confession. She found the magistrate, two policemen and the accused in chambers. The accused started narrating his confession in Swahili language though he occasionally switched to Kikuyu language. He narrated how he stabbed the deceased and Muriuki's son and how he put their bodies under the bed when he thought that he had killed both of them. She confirmed that the accused signed the confession in her presence.

In his defence which he opted to give on oath, the accused admitted that he knew **Julius Karuga(PW4)**

and his family; he also admitted that on 4th July, 2008 he went to his home at Karatina to take some money to his wife. He opened the gate and entered the home; the door to the house was however locked though the outer burglar proof grill was opened. While he was waiting at the door, Emily together with a police officer and other two people arrived at the home through the gate. Emily and the police officer pushed the door open and entered the house. He remained behind with two other people. After a short while, Emily and the police officer called those who were outside the house. The accused followed them and they entered the house together. The house was disorderly and there was blood on the floor. The police officer then asked everybody else to leave the house except the accused. He was then locked inside the house. As he was looking for where to escape from, he stumbled on the deceased's body. He also noticed a child on the bed. He took the child but returned him on the bed when he realised that he had died, or so he thought. He was arrested when more police officers arrived. He was taken to the magistrate to whom he narrated what he testified in court. He denied having murdered the deceased. He denied that he had confessed to the killing of the deceased.

Having laid out the evidence as was presented at the trial, it is necessary at this stage to consider the applicable law; the relevant provisions in this quest are **sections 203, 204 and 206** of the **Penal Code**.

Murder is defined in **section 203** of the **Penal Code**; it states as follows

203. Murder

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

Section 204 on the other hand, prescribes the sentence for this offence; it is death.

Going by **section 203** of the Code, a trial court can only convict for the offence of murder if it is established beyond reasonable doubt that a person has died; that the death was unlawful; that it was committed by another person as a result of his act or omission; and finally, the act or omission that resulted in the death was motivated by malice aforethought, express or implied. (**See Woolmington v DPP [1935] AC 462**).

Talking of malice aforethought, it is the mental element of murder; it is express when it is proved that there was an intention to kill unlawfully (**see Beckford v R [1988] AC 130**), but it is implied whenever it is proved that there was an intention unlawfully to cause grievous bodily harm (**see DPP v Smith [1961] AC 290**). It is apparent that intent is a common element in both forms of malice aforethought.

Section 206 of the **Penal Code** prescribes circumstances under which malice aforethought may be deemed to have been established; it provides as follows:

206. Malice aforethought

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;

(b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;

(c) an intent to commit a felony;

(d) an intention by the act or omission to facilitate the flight or escape from custody of any

person who has committed or attempted to commit a felony.

Almost all the prosecution witnesses were consistent that in their evidence on the deceased's death. **A (PW1)** saw her sprawled on the floor bleeding; he also saw her being stabbed and the body thrown under the bed where he himself was thrown when the assailant thought he was dead. **Emily (PW3)** also testified that when they finally accessed the house, they found the deceased lying dead in a pool of blood. **Geoffrey Wahome Wambugu (PW6)** also testified that he saw a body of a female person under the bed in Emily's house. Similarly, police constable **Christopher Ndegwa (PW7)** testified that he was shown the body of a female inside this house by the accused person himself. **Police constable Otieno (PW8)** and the scenes of crime officer, **John Mugo (PW9)** also witnessed the deceased body at the scene of crime. **David Maina (PW5)** confirmed that the body was that of his sister, the deceased, when he attended the post-mortem examination.

It is also not lost that the accused himself testified that he also saw the body of the deceased in the house.

The deceased's death was certified as such by the pathologist, **Dr Paul Kimathi (PW11)**.

With all this evidence, the deceased's death was proved beyond all reasonable doubt. By the same token it was also proved that the deceased did not die a natural death. All these prosecution witnesses also testified that the deceased had been stabbed and that she was found lying in a pool of blood. To cap it all, the pathologist established the cause of death to be 'penetrating stab wounds on the chest and abdomen'.

This goes to show that the death of the deceased was caused by an unlawful act. It follows that, the first limb of this offence of murder was proved beyond reasonable doubt.

The next question to consider is whether the accused person perpetrated this offence and if so whether he had the necessary mental element to commit it.

Of all the prosecution witnesses, only **A (PW1)** testified that he saw the accused person stab the deceased at least on one occasion. The rest of the witnesses' evidence linking the accused to the deceased's fatal stabbing was largely circumstantial. Accordingly, the evidence against the accused in this regard was both direct and indirect.

Although I did not have occasion to hear and see the A testify since his evidence was taken before my predecessor in this matter, as was most of the other prosecution witnesses' evidence. However, there is nothing I can find in his evidence or in the evidence of other witnesses including the evidence of the accused person that suggests that he was not a credible or trustworthy witness. I find him to have been a candid and truthful witness whose evidence as to what he saw and did to be strong enough to stand on its own.

But even then, there were other witnesses who corroborated A's evidence. According to A he was attacked by the accused as soon as he came back home from school. He, at the same time noticed that the house-girl, the deceased, had been wounded and was lying on the floor in the sitting room. The attacker threw both of them under the bed thinking that they were dead. He managed to escape, though, through the backdoor. This is the same narrative he gave to their neighbour, John **Mwangi Muriuki (PW2)** who took him to Karatina; his mother, **Emily (PW3)** and police constable **Erick Otieno (PW8)**. More importantly, it does not appear that he was shaken or that his evidence was discredited in any manner during cross-examination.

The evidence of the rest of the witnesses was also corroborative of A's evidence. The quick police response to the murder and A's assault was because of the report he made to those that he came in contact with. Had he not been lucky enough to escape and live to tell what happened, nobody would have known that the accused person was behind the heinous crime committed against him and the deceased.

When these witnesses responded and went to Emily's home, they confirmed what he had told them; they found blood splattered around the living room; they also found the deceased hidden under the bed; they

also found the iron rod with which the accused person stabbed A and the deceased. As luck would have it, they found the accused person still in the house. I take it that since he was under the mistaken belief that he had killed both A and the deceased he was in no hurry to leave until he found what he was looking for.

The accused himself did not deny that he was found at the scene; he admitted that he was at the Emily's house, but standing by the door. I find his defence unbelievable because, first, though he alleged that he travelled all the way from Kirinyaga to bring some money to A's mother, Emily, he never stated what this money was for and again he never raised this issue of money when he had occasion to cross-examine Emily herself when she testified. As a matter of fact, he never raised it with any of the prosecution witnesses. One is bound to conclude that this line of defence was only an afterthought.

In any event, though he testified that the front door to the house was locked and perhaps it was for this reason that he was waiting outside, he said that when Emily and the police officer came they simply pushed the door open and entered the house. I find this evidence to be inconsistent.

I find the evidence of **Emily (PW3)**, **Geoffrey Wahome Wambugu (PW6)**, police constable **Christopher Ndegwa (PW7)** and police constable **Erick Otieno (PW8)** that they found the accused in the Emily's bedroom to be more believable. Their evidence in this regard was consistent and there is nothing in it to suggest that they could have conspired to give false testimony against the accused.

The evidence of the accused person being in Emily's house may be circumstantial but it is, in my view, sufficient enough to link the accused to the murder of the deceased. Looking at this evidence in the context of the entire evidence on record I cannot help but conclude that the accused person murdered the deceased.

In my humble view, the inculpatory facts point to the guilt rather than the innocence of the accused person. Section 164 of the Evidence Act cap 80 makes reference to this kind of evidence; it states: -

164. Circumstantial questions to confirm evidence

When a witness the truthfulness of whose evidence it is intended to confirm gives evidence of any fact, he may be questioned as to any other circumstances which he observed at or near the time or place at which the fact occurred, if the court is of opinion that such circumstances, if proved, would tend to confirm the testimony of the witness as to the fact to which he testifies.

An inference of guilt can be drawn from such evidence and where the court is satisfied with its sufficiency it can safely convict; the parameters within which the court can base its conviction on circumstantial evidence is stated in "**Wills on Circumstantial Evidence**" which was cited with approval in **Republic versus Kipkering Arap Koske & Another (1949) XVI EACA 135** where the Court of Appeal of East Africa had this to say;

"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 **Privy Council in Teper versus Republic (1952) AC 480** cautioned that the trial court must be wary of any circumstances that would weaken or destroy the inference of guilt whenever a conviction is based on circumstantial evidence. At page 489 of its decision 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."

My evaluation of the circumstantial evidence against the accused person leads me to conclude that the

inculpatory facts are incompatible with the innocence of the accused; these facts are, in my humble view, the manner in which the deceased was murdered; the recovery of the murder weapon or weapons at the scene of crime; the pathologist's report of the cause of the death of the deceased; and the arrest of the accused person at the scene of crime. These facts are, in my view, incapable of explanation upon any other reasonable hypothesis than that of the accused person's guilt.

Was malice aforethought established? I reckon it was. I find some truth in the evidence that, though he did not openly show it, the accused may have been unhappy with the sale of part of their family land to **Julius Muriuki Kabogo (PW4)**. **Kabogo** himself alluded to this possibility when he testified that on the fateful day, the accused called him and told him that he had killed his house girl and son and that he wanted the title to the land. When police constable **Christopher Ndegwa (PW7)** interrogated him, he opened up and told him that he wanted to wipe out Kabogo's entire family for buying his family land.

That aside, by stabbing the deceased repeatedly as the pathologist's evidence showed, the accused person knew that the injuries would cause the deceased's death or would probably cause her grievous harm. He may have also been simply reckless whether death or grievous harm would result. Either way, in the absence of any evidence of mitigating factors, I am satisfied that the necessary mental element or malice aforethought was proved to the required standard.

There was evidence that the accused himself offered a confession which was duly recorded by **Hon. Lucy Mbugua (PW12)**. The accused, however, entered a plea of not guilty to the offence of murder and thereby retracted the confession; this meant that the state still had to bear the burden of proving its case against him beyond reasonable doubt. In the face of the retraction, I accept the evidence on confession as merely corroborative of the other prosecution evidence. In my humble view, a strong case sufficient to convict the accused has been made out even without the confession.

On the whole, I hold that the prosecution has proved its case against the accused person beyond reasonable doubt; accordingly, I hereby find and hold that the accused person is guilty of the offence of murder contrary to **section 203** of the **Penal Code** and, pursuant to **section 215** of the **Criminal Procedure Code**, he is convicted accordingly.

Signed, dated and delivered in open court this 13th October, 2017

Ngaah Jairus

JUDGE