



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAKURU**  
**CRIMINAL CASE NO 90 OF 2008**

REPUBLIC ..... PROSECUTOR

VERSUS

GEOFFREY NJOROGE MATHERI alias FONGO .....ACCUSED

**JUDGMENT**

The accused **GEOFFREY NJOROGE MATHERI alias FONGO** faces a charge of **MURDER CONTRARY TO SECTION 203 as read with SECTION 204 OF THE PENAL CODE**. The particulars of the charge are that;

***“On an unknown date during the month of August 2008 at Kihoto Estate in Naivasha District within Rift Valley Province jointly with others not before court murdered MIRIAM WAIRIMU”***

The accused was arraigned before the High Court in Nakuru accompanied by a blaze of publicity on 3/9/2008. However, it was not until 10/6/2013 that his trial eventually commenced before Hon. Justice Anyara Emukule, who heard the evidence of the first seven (7) witnesses.

Following the transfer of **Hon. Justice Emukule** to the Mombasa High Court I took over the case and I recorded the evidence of the remaining five (5) witnesses. The prosecution finally closed their case in this matter on 6/5/2010 a full three (3) years after the first witness had testified and eight (8) years after the accused had first been arraigned in court.

The prosecution case revolved around the recovery of decomposing female remains buried in a shack in the Kihoto area of Naivasha. **PW1 JACINTA NYAGUTHII** told the court that on 4/8/2008 she came to Naivasha from Narok to visit a relative. Upon arrival at Kihoto Estate at about 1.00pm she found a girl groaning in pain on one of the houses in the estate. She alerted the community crisis officers of the incident.

**PW4 NAOMI WANJIRU** told the court that on 9/8/2008 at about 7.30pm she was abducted by four street boys who then delivered her into the hands of the accused. She stated that the accused took her to his house where she found another girl lying on the bed. The accused then drugged **PW4**. He cut her shoulder and drained her blood into a tin. Some days later accused released the other girl (known as Esther) but he threatened to kill **PW4**. He took her outside but before he could carry out his intention, police who had been alerted by **PW1** came and rescued her. The accused meanwhile ran away.

**PW9 JOHN OLE MPOOKE** is a general manager at Soysambu Conservancy but was also a Crisis Community Officer. On 14/8/2008 he received a call from one ‘**Phyllis Gachie**’. He rushed to Kihoto

Village in Naivasha where he found a young lady called Naomi (**PW4**) who was a victim of assault together with a man. When **PW9** and police approached the man ran away. They rescued the girl **PW4** who could barely walk. She informed them that she had been abducted and detained in that house for several days. Upon searching in the adjacent plot they found a second girl called '**Sarah**' who had also been abducted and detained by the accused. Both women who had cuts on their bodies were rushed to Naivasha Hospital for treatment.

The next day **PW9** received information from neighbours that a body had been recovered buried inside a shallow grave one of the shacks in that plot. **PW9** and police returned to the scene. The police exhumed the decomposing female remains which were taken to the mortuary. In the same house they recovered blood stained mattresses, school uniforms for girls, whips etc. Police commenced investigations to determine the identity of the deceased and the circumstances leading up to her death. On 15/8/2008 police arrested the accused from a hotel in Naivasha town. He was taken to the police station. Upon conclusion of police investigations the accused was arraigned in court and charged with the offence of murder.

At the close of the prosecution case the accused was found to have a case to answer and was placed onto his defence. He elected to make an unsworn statement in which he denied any and all involvement in the death of the deceased. This court must now analyse the evidence on record with a view to determining whether this charge of murder has been proved beyond reasonable doubt.

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

***“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 three (3) crucial ingredients of the offence of murder, all of which must be proved beyond reasonable doubt in order to prove the offence.

***(i) Proof of the fact and cause of death of the deceased***

***(ii) Proof that the deceased met his/her 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 evidence was tendered that certain decomposing female remains were recovered buried inside a house in Kihoto Estate.

**PW8 DR. PETER MURUTU NDEGWA** a pathologist with the Department of Diagnostic and Forensic services, Medico Legal Services, of the Ministry of Health told the court that on 28/8/2008 at about 2.30pm at Naivasha District Hospital he conducted an autopsy on those remains. He made the following external observations.

- Right ankle cut deeply by a barbed wire.
- Big toe and first toe on right foot amputated
- Incision on left wrist joint
- Penetrating stab wound on right pelvis
- Deep incisive wound on right thumb
- Left nipple head ripped off
- Penetration stab wound on left breast

- Cut wound around left nipple

Upon internal examination **PW9** noted the following

- Left rib cage perforated
- Left lung perforated

Based on these findings and observations, the pathologist concluded that the cause of death was **“hemorrhage due to multiple cut and stab wounds”**. He filled and signed the post mortem report **P. Exh 20** which was produced in court as an exhibit. This was expert medical evidence regarding cause of death and was neither challenged nor controverted in any way by the defence. This court has no reason to doubt this expert medical opinion. It is quite clear that this deceased met a gruesome, death after being tortured in some kind of ritualistic fashion. I am satisfied that the cause of death has been sufficiently proved.

However, having proved the manner in which this deceased met her death, surprisingly the prosecution made no effort at all to establish the **‘identity’** of the deceased person. In the information the name of the deceased is given as **‘MIRIAM WAIRIMU’**. It behoves the prosecutor to tender evidence to prove, firstly that the person known as **‘Miriam Wairimu’** is actually deceased and secondly that the remains which were exhumed from that house in Kihoto Estate were in actual facts the remains of this **‘Miriam Wairimu’**.

No relative of the deceased has come forward to identify the remains. No relative attended the autopsy and identified the body to the pathologist. **PW9** told the court that he conducted the autopsy on the remains of an **“unknown female”**. No relative of this **‘Miriam Wairimu’** was called to confirm to the court that she is in fact missing and/or deceased. No death certificate or burial permit for **‘Miriam Wairimu’** was produced as an exhibit. In short no evidence was adduced to prove that **‘Miriam Wairimu’** was actually dead.

**PW7** who obtained orders for the exhumation of the body and **PW9** who was present when the body was exhumed told the court that they had no idea who the deceased was. **PW3** who gave a lengthy narrative about her ordeal in the hands of this accused person only talked of finding a girl called **‘Esther’** in the accused’s house. Indeed **PW3** categorically stated that

***“I do not know Miriam Wairimu”***

Similarly **PW1 JACINTA NYAGUTHII** who alerted crisis community officials of the incident did not mention having seen any dead body. She only talked of having rescued two ladies, who were both rescued alive.

**PW2 ZACHARIA MUCHIRI** who went with police to the house only said that he collected a spade from his house and dug up a **‘body wrapped in a bed sheet’**. He had no idea who the deceased was.

Given that the body was decomposing it may have been difficult to positively identify the deceased from her visual appearance. In such cases where a body has been badly mutilated or is decomposing circumstantial evidence may be admitted to establish the identity of the deceased.

In the case of **STATE Vs BERRY (2000) NLR** it was held that

***“circumstantial evidence which may be admitted to establish the victim’s identity may include fingerprints, medical and dental testimony, fragments of bone and portions of a body, clothing found on or near the body, other personal effects found on or near the body, photographs of the living victim or the body, a dying declaration, and other kinds of evidence”***.

**PW8** told the court that after conducting the autopsy he did collect samples of the muscles and tissues

from the body for analysis, and DNA testing. These samples were then forwarded to the government chemist for analysis and comparison with a relative in order to establish the true identity of the deceased.

**PW5 HENRY KIPTOO SANG** a Government Analyst told the court that he did on 4/9/2008 receive certain exhibits from the police for analysis. Amongst the items he received were

***“A piece of liver, muscle and hair in a white plastic container labeled Exh E deceased”***

The findings of the DNA profiles generated from these exhibits did not help ascertain the true identity of the deceased. The Government Analyst in his report indicates that he made an attempt to compare the piece of human liver with the DNA sample of one ‘**Joseph Nganga Kimani**’. His findings were that

***“The liver was highly degraded and therefore did not yield a full profile to compare conclusively with the DNA profile generated from the blood sample labeled Joseph Nganga Kimani for paternity analysis”***

Given that **PW5** was requested to conduct a ‘**paternity**’ analysis of the human remains, against the blood sample of ‘**Joseph Nganga Kimani**’ it would be safe to assume that this ‘**Joseph Nganga Kimani**’ was the father of the deceased. He was therefore a crucial witness and his evidence was essential to shed light on the disappearance and/or death of this ‘**Miriam Wairimu**’

The said ‘**Joseph Nganga Kimani**’ was never called to testify to explain how or indeed if he was in any way related to ‘**Miriam Wairimu**’. The evidence of person was essential to shed light on who the deceased was and to confirm whether this ‘**Miriam Wairimu**’ was in fact missing, where she was last seen etc.

**PW12** (the investigating officer) informed the court that police traced the family of the deceased. If that was so then why did the prosecution omit to call these family members to testify regarding the disappearance or death of their kin. Failure to call these family members as witnesses leaves a huge gap in the prosecution case.

In the Nigerian case of **UKWAEGBE ENEWOH Vs STATE 1990 NWLR (Pt 145) 469.2** the court held as follows

***“Unless the death of a person in respect of whom the accused was charged is proved beyond reasonable doubt, the accused may be convicted for the murder of a person yet alive. This should be avoided”.***

From the evidence on record it has not been proved beyond reasonable doubt that the female remains were actually those of ‘**Miriam Wairimu**’ the deceased named in the charge sheet. The identity of the deceased remains a mystery. The prosecution have therefore failed to prove one very crucial ingredient of this charge of murder - the fact that ‘**Miriam Wairimu**’ the alleged victim in this case is actually dead. On this ground alone the charge would fail.

Be that as it may notwithstanding the failure to establish the identity of the deceased I will proceed to consider the evidence on record with a view to determining whether it has been proved beyond reasonable doubt that it was the accused who caused the death of this unknown female. The prosecution relied on three main factors in order to impute guilt on the part of the accused

***(i) An alleged confession made by accused.***

***(ii) Recovery of the body buried inside a house said to belong to the accused***

***(iii) The conviction of the accused for the abduction and rape of two (2) other women.***

With respect to the alleged confession the law clearly provides in Section 25A of the Evidence Act the

circumstances in which a confession may be admitted as evidence in court. Section 25 A (1) provides that

***“25 A (1) A confession or any admission of a fact tendering to the proof of guilt made by an accused person is not admissible and shall not be proved as against such person unless it is made in court before a judge, a magistrate or before a police officer (other than the investigating officer) being an officer not below the rank of Chief Inspector of Police, and a third party of the persons choice”***

The prosecution called as a witness SSP **KIBOR KIRUI PW3** a Scenes of Crime Officer based at CID Headquarters **PW3** narrated how on 22/8/2008 he travelled to Naivasha and recorded a video of the accused leading the police to various locations connected to the offences which he was suspected of having committed. In that video the accused talked about having been engaged by a certain pastor to collect human blood. In the same video the accused admits to having killed a lady and buried her body inside a house. Does this admission amount to a confession admissible in court?

**PW3** gave evidence as the person who **recorded** the video. There was no evidence that he cautioned the accused before starting to record the video. Neither did **PW3** inform the accused of his right to have a lawyer or a relative present during the recording of said video. The accused therefore did not nominate an advocate or a family member to be present during that recording. The recording of this video was **not** done in compliance with the Section 25 A Evidence Act or the Evidence Act (Out of court confessions) Rules 2014. Indeed during the production of this video it was made clear that the only role **PW3** played was to shoot (record) the video and defence counsel would have an opportunity to cross examine the investigating officer later regarding the contents of the video. Therefore **PW3** did not testify as an officer who recorded a confession from the accused. His only role was the technical role of shooting the video.

Article 50 of the Constitution of Kenya 2010 guarantees to every suspect the right to a fair trial. The elements of a fair hearing are set out in this provision of the Constitution. Article 50(2) (1) provides that

***“(2) Every accused person has the right to a fair trial which includes the right –  
(1) to refuse to give self incrimination evidence”***

The recording of this video by **PW3** certainly involved the accused given self incriminatory evidence in violation of his rights as guaranteed by Article 50(2)(1). Such evidence is not admissible unless the accused had first been properly cautioned and had following such a caution made an informed decision to waive that right. This was not done by **PW3** in this case.

**PW 12 CHIEF INSPECTOR CALISTAS MAUKO** was the investigating officer. He told the court that he did visit the scene at Kihoto Estate and collected various exhibits. **PW12** also told the court that he recorded a statement under enquiry from the accused after properly cautioning the accused. He sought to have that statement admitted as an exhibit. The accused through his lawyer objected to the admission of the statement on the basis that he was not properly cautioned before this statement was recorded. The court ruled that a trial within a trial be conducted to determine the admissibility or other wise of the statement. **PW12** was stepped down and a fresh date was given for the trial within a trial to proceed. The witness never returned to the dock. No trial-within-a trial was ever conducted and the prosecution closed its case **without** producing into the evidence the alleged confession.

I therefore find that there exists no valid and/or legally admissible confession made by the accused the basis upon which this court may impute his guilt in the death of the deceased.

It has been alleged that the decomposing remains of a female body were recovered in a house belonging to the accused. There was no witness who saw the deceased bury a dead body in that house in question.

**PW7 CORPORAL JUMA KITONGA** was one of the officers who went to the scene at Kihoto village where the body was found **PW7** stated in his evidence that

***“We were led by the suspect and [he] confirmed to us that the house was his residence”***

However later under cross-examination by defence counsel PW7 says

***“I remember I recorded my statement dated 23/8/2008. I did not indicate that I went with the suspect. It’s what I have stated to the court – that the accused led us to his house”***

If indeed it was accused who led police to that house why did PW7 omit to include such an important fact in his statement. It is curious that PW7 only recalls this fact while giving in his evidence nearly six (6) years after the incident yet he failed to include it in his statement which was recorded when events were still fresh in his mind.

The testimony of PW7 is directly contradicted by PW9 who told the court that it was neighbours who alerted them to the existence of the dead body. PW9 also accompanied police to the scene. He made no mention that it was accused who led police to that house indeed PW9 states that

***“As we went to the house I did not know whose house it was”***

This directly contradicts the testimony of PW7 that accused told them it was his (accused’s) house. It is clear that PW7 was merely trying to tailor his testimony to strengthen the prosecution case. If it was accused who led police to the house and identified it as his I have no doubt PW7 would have stated this in his original statement recorded shortly after the incident. PW9 goes on to state under cross examination that

***“There were 4 houses in the plot. The accused occupied only one house. The other houses were vacant. They were closed.....”***

PW9 goes on to state that

***“I confirm that the grave was not inside the room which the accused occupied”*** (my own emphasis)

If the body was **not** recovered inside the house occupied by accused how can he be held responsible for the presence of a dead body inside a vacant house, especially since nobody saw accused bury the body there. The plot was open and accessible to anyone. The accused cannot be implicated due to the recovery of a body in a house not occupied by himself.

Several of the witnesses have testified that the accused was arrested, tried and convicted in a Naivasha Court for the abduction and rape of two girls PW2 and PW3. However, both girls were rescued alive. The fact that accused may have been involved in the abduction and assault of other girls is not proof that he murdered the deceased. In order to prove its case the prosecution must adduce tangible evidence linking the accused to the dead body. The facts do lead one to suspect the involvement of the accused in the murder of this unknown female but suspicion alone will not suffice. In the case of SAWE Vs REPUBLIC (2003) KLR 364 the Court of Appeal held that

***“The suspicion may be strong but this is a game with clear and settled rules of engagement. The prosecution must prove the case against the accused beyond reasonable doubt. As this court made clear in the case of MARY WANJIKU GICHIRA Vs REPUBLIC (CRIMINAL APPEAL No. 17 OF 1998 (unreported)), suspicions, however strong cannot provide a basis for inferring guilt which must be proved by evidence”***

PW5 who was the Government Analyst testified that he received samples from the body of the deceased which he analyzed and compared with samples taken from the accused. PW5 also did DNA profiling. In his report PW5 made no finding which linked the accused to the dead body. Thus the scientific forensic report does not link the accused in any way to the deceased person.

The prosecution sought to rely on circumstantial evidence to implicate the accused in this murder. In the cited case of REX Vs KIPKERING arap KOSKE & ANOTHER (1949) EALR it was held as follows

***“..... In order to justify on circumstantial evidence 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”.***

Thus for circumstantial evidence to suffice it must point **exclusively** at the accused as the perpetrator of this offence. I find that the evidence on record does not meet that standard. There exists the very real possibility that the deceased may have been murdered by person(s) other than accused and her remains buried in that house. This possibility has not been sufficiently excluded by the prosecution. The owner of that house where the body was recovered remains unknown. The fact that accused was tried and convicted of other similar offences in a Naivasha Court is not proof of his involvement in this murder. At best the evidence leads to a suspicion that accused may have killed the deceased. As stated earlier in the SAWE Case suspicion no matter how strong cannot form the basis for a finding of guilt. The failure by the investigating officer in this case PW12 to conclude his testimony was in my view fatal to the prosecution case. Only the investigating officer would have been able to clarify the anomalies I have pointed out *e.g* identity of the deceased. PW12 was not cross examined by defence counsel thus his testimony remained untested. In any criminal case the burden of proof lies exclusively with the prosecution who have a duty to prove their case beyond reasonable doubt. At no time does this burden ever shift to require an accused person to prove his innocence.

All in all the prosecution case lacked cogency and failed to prove the charge of murder to the standard required in law. Based therefore on the foregoing I enter a verdict of **‘Not Guilty’** and I acquit the accused of this charge of murder.

Accused is to be set at liberty forthwith unless he is otherwise lawfully held.

Dated in Nakuru this 29<sup>th</sup> day of July, 2016.

**Maureen Odera**

**Judge**