



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CRIMINAL CASE NO.77 OF 2011

LESIT, J.

REPUBLIC.....PROSECUTION

VERSUS

JENNIFER WANJIRU NG'ANG'A aka

MAMA FLORA aka MAMA MWANGI

aka MAMA KABIRI.....ACCUSED

JUDGEMENT

1. The accused person **JENNIFER WANJIRU NG'ANG'A aka MAMA FLORA aka MAMA MWANGI aka MAMA KABIRI** is charged with eight counts of **Murder** contrary to **section 203** as read with **section 204** of the **Penal Code**. In count 1 the particulars of the offence are:

“That on the 11th day of September, 2011 at Gitambaya Village in Ruiru District within Kiambu County murdered JANE WAMBUA KAMAU ALIAS WA KAMAU.”

2. In count 2 the particulars of the offence are:

“That on the 11th day of September, 2011 at Gitambaya Village in Ruiru District within Kiambu County murdered FESTUS DAVID NZUKI.”

3. In count 3 the particulars of the offence are:

“That on the 11th day of September, 2011 at Gitambaya Village in Ruiru District within Kiambu County murdered DAVID KARANJA NDUATI.”

4. In count 4 the particulars of the offence are:

“That on the 11th day of September, 2011 at Gitambaya Village in Ruiru District within Kiambu County murdered SAMUEL WAWERU WANJIKU.”

5. In count 5 the particulars of the offence are:

“That on the 11th day of September, 2011 at Gitambaya Village in Ruiru District within Kiambu County murdered JAMES MWITA WANJIKU ALIAS FRANCIS MWITA.”

6. In count 6 the particulars of the offence are:

“That on the 11th day of September, 2011 at Gitambaya Village in Ruiru District within Kiambu County murdered JULIUS KARIUKI MWANGI.”

7. In count 7 the particulars of the offence are:

“That on the 11th day of September, 2011 at Gitambaya Village in Ruiru District within Kiambu County murdered JOSEPH NDICHU KAMAU.”

8. In count 8 the particulars of the offence are:

“That on the 11th day of September, 2011 at Gitambaya Village in Ruiru District within Kiambu County murdered STEVEN NZUKI.”

9. The prosecution called a total of seventeen (17) witnesses.

10. This case was first heard by Muchemi, J who took the evidence of 11 witnesses. I took over the matter under **sections 201(1) and 200** of the **Criminal Procedure Code**. The accused opted to have the matter proceed from where the previous Judge left off and did not require recalling of any witness for further cross-examination. I proceeded to hear the evidence of PW12 to PW17 and the accused sworn defence.

11. The summary of the prosecution case was that the accused owned a pub in Ruiru known by the name **“Mutongwe pub”** also known as the **“Kings pub”**. Secondly that she sold alcohol laced with methanol, a dangerous substance which caused the death of eight persons who had purchased and consumed the alcohol from her pub on the 11th September, 2011.

12. The accused person opted to give a sworn defense and put forward an alibi as her defense. She said that she did not own any club or pub by alleged or any names, and that she did not carry out any alcohol selling business. The accused also denied knowing any of the deceased persons or ever selling to them any alcohol, nor engaging in the manufacturing of any illicit or adulterated brew. She denied causing the death of the deceased persons. The accused also denied ever meeting any of the witnesses who testified in court. She said that when the police came to her house they searched and found nothing.

13. Mr. Njunge for the accused filed written submissions. Ms Mwaniki learned Prosecution Counsel for the State also filed written submissions in the case.

14. The gist of the submissions by the Ms. Mwaniki learned Prosecution Counsel was that the State has successfully established the ingredients of murder and the fact that all the deceased persons went to the accused persons premises where they consumed the illicit brew after which they all complained of various body pains prior to their deaths.

15. Counsel urged that the Government analyst reports showed that methanol, which he stated was a highly toxic substance to human beings, was found in the deceased persons organs and blood which had been submitted for analysis. Ms. Mwaniki urged that there was sufficient evidence to show that the deceased persons whose vital specimens came negative for toxicology had been at accused person’s premises and consumed the said illicit brew. Counsel dismissed the alibi defense as it was raised at the defense stage or during cross examination and can therefore be deemed as an afterthought.

16. The gist of the submissions by the Defense Counsel Mr. Njugi is that the prosecution failed to establish the causes of death for the deceased persons. Counsel urged that the post mortem reports were

inconclusive on the cause of deaths and further that the toxicology reports were not incorporated in the Post Mortem Reports.

17. Mr. Njugi argued that PW1 admitted that exhibits 7(a) and 8 being toxicological reports of David Karanja Nduati and Samuel Waweru Wanjiku indicated no traces of methanol and therefore the finding in the postmortem report that they died of possible poisoning remained just a possibility.

18. Counsel also urged that none of the prosecution witnesses displaced the accused alibi that she was attending a chama elsewhere at the time of alleged offence. Counsel also urged that none of the prosecution witnesses saw her selling beer at the pub. Counsel urged that the deceased died on different dates as indicated in the postmortem reports and that the accused could not have caused their deaths as they were alive on the 11th September 2011, the date they are alleged to have died.

19. Mr Njugi urged that malice aforethought was not established and finally that the prosecution did not adduce any direct evidence linking the accused to the death of the deceased persons or even placing her on the scene when the illicit brew was being sold to the deceased persons.

20. Counsel relied on several cases which I have considered.

21. I have carefully considered the evidence adduced by the prosecution and the defence as well as the written submissions by learned Counsels for the State and the defence. I have considered the authorities relied upon.

22. The accused person faces eight charges of **Murder** contrary to **section 203** of the **Penal Code**. The section creates the offence of murder and provides as follows:

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

23. Malice aforethought is an essential ingredient for the offence of murder. The circumstances which constitute malice aforethought are set out under **Section 206** of the **Penal Code** 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;

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.”

24. The burden lies with the prosecution to prove the case against the accused person beyond any reasonable doubt. The prosecution has to adduce evidence to establish that the accused person, unlawfully and by some act or omission caused the death of the deceased persons.

25. The prosecution in this case is relying exclusively on circumstantial evidence by the prosecution witnesses to the effect that the deceased persons went to the accused pub on the 11th September 2011 and drank alcohol which was detrimental to their health and which led to their death.

26. Regarding circumstantial evidence the leading case is **REP V. KIPKERING ARAP KOSKEI & ANOTHER 16 EACA 135**, where the Court held:

“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.”

27. In order to test whether the circumstantial evidence adduced by the prosecution meets the legal threshold it must meet the principles set out in the case of **ABANGA alias ONYANGO V. REP CR. A NO.32 of 1990(UR)** where the learned Justices of the Court of Appeal held thus:

“It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests:

- i. the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;**
- ii. those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;**
- iii. the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.”**

28. Having considered the entire evidence adduced by both sides I find that the following issues arise:

- a. Whether the prosecution had proved that the cause of the death of the deceased persons was illicit brew sold at Mtongwe club or Kings Pub?**
- b. Whether the prosecution had established that the bar known as Mtongwe Club or Kings Pub was owned by the accused?**
- c. Whether the evidence adduced by the prosecution had established that the accused had malice aforethought?**
- d. Whether the prosecution proved motive for the offence, and whether motive is an essential ingredient for this offence?**

29. I will deal with the first issue of whether the prosecution had proved that the cause of the death of the deceased persons was illicit brew sold at Mtongwe club or Kings Pub? Mr. Njugi urged that the evidence of PW17 was not conclusive as to the cause of death and also the post mortem reports were not incorporated into the toxicology reports. Mr. Njugi cited the case of **Rep Vs.Juma Masika [2006] eKLR** for the proposition where the toxicology report is not incorporated into the post mortem report the cause of death is inconclusive. I have no quarrel with that holding.

30. Mr. Njugi cited the case of **Rep vs Sila Munguti & another [2015] eKLR** for the proposition that there is need for a conclusive post mortem report.

31. Ms. Mwaniki on her part urged the court to find that since there was evidence the deceased persons partook of brew in the accused premises it is enough suspicion of cause of death.

32. The prosecution case is that after the deceased died their bodies were taken for post mortem. Dr. Oduor who performed the post mortems on all the bodies suspected poisoning and he therefore took blood, liver, kidney, stomach and stomach contents from each of the deceased bodies for analysis by the Government Chemist, hereinafter Govt. Chem. I will therefore begin with what the Govt. Chem. found.

33. PW1 was the Government Chemist. He testified that on 23rd September 2011, he received for analysis the specimens drawn from the bodies of the deceased at post mortem. These were liver, kidney, blood and stomach contents of each of the 8 deceased persons 11. The analyses carried out on the specimens indicated that except in the case of David Karanja Nduati, hereinafter referred to as David, and Samwel Waweru Wanjiru, and hereinafter referred to as Samwel, all the other specimens were found to have high levels of methanol and ethanol. PW1 stated that the level of laced methanol found, a highly toxic industrial alcohol, was lethal and may have solely caused the death of the deceased persons as no other chemically lethal-toxic substance was detected in the submitted post mortem specimen. For the two whose results were negative for methanol, PW1 testified that their blood was not submitted for analysis.

34. PW17 Dr. Oduor Johansen carried out post mortem examination on the bodies of all the deceased persons on 22nd September 2011 when he removed the specimen as aforesaid. When Dr. Oduor testified in court on the 14th October, 2015, he said he was seeing the results of the toxicology in court. He therefore went through each post mortem report prepared by him, and the respective toxicology reports in respect of each deceased. After reconciling the post mortem reports and the toxicology reports Dr. Oduor testified that the cause of death of all the deceased, except David and Samwel was methanol poisoning.

35. For David and Samwel, Dr. Oduor testified that he had also drawn blood from their bodies and had also submitted them to the police together with the other specimen for transmission to the Govt. Chem. He stated that for these two deceased unlike the rest of them, he did the post mortem at Thika in Bishop Okoya Mortuary and he could not understand why only in their case the blood was not seen by PW1.

36. Dr. Oduor said that in his opinion the cause of the death of David and Samwel was methanol poisoning given the circumstances that they had consumed illicit brew like the other deceased. That conclusion is not acceptable and court has to go by the facts placed before it. I accept to be guided by the cited case of **Rep vs Munguti**, supra, that it is important that the post mortem report is conclusive. And where the results of examination, autopsy or analysis, a pathologist reading things into his finding which are not based on the examination, then that is misleading. In any event the opinions of doctors are not binding. The court can examine them and be justified to arrive at a different conclusion.

37. For the two deceased, David and Samwel if for those who died of methanol poisoning it was evident in their blood, why not these two. The only conclusion is that maybe something else which Dr. Oduor and PW1, Dr. Crispus Wandera did not discover in their examinations and analysis caused their deaths.

38. PW16 CPL Moses Kiema was on duty when the DCIO Ruiru one Muriithi came with a group of people to the office to record a statement. The people complained of severe stomach ache caused by a drink they had taken. He recorded a statement from PW15 Antony Kiarie and also took all the statements that had been recorded by his colleagues from all the other witnesses and compiled a file for the same. From this evidence it is evident complainants made their complaints in a group, and they included PW15 in this case. PW16 stated that these complainants were witnesses in the case. Prosecution had 27 witnesses but reduced them to 17. It is clear who these complainants were.

39. In regard to the first issue, I find that the evidence adduced by the prosecution shows clearly that the cause of death of all deceased except David and Samwel was methanol which was in the brew they had consumed. As to whether the brew was sold in Mtongwe bar, I will consider from the rest of the evidence.

40. I now get down to the evidence adduced in respect of each count.

41. In count one, the accused is charged with the murder of Jane Wambua alias Wa Kamau. PW 5 Lillian Njambi Wanyoro the daughter of Jane Wambui the deceased said that she knew Jennifer Wanjiru, the accused who was a close neighbour to their mother at Gitambaya in Ruiru and who their mother frequently visited. She was informed of her mother's arrest by her sister on 13th September 2011. When they met their mother at the police station she complained of pain in her chest and blurred vision. They took her to Ruiru Health Centre for treatment but shortly after the treatment when she returned home, her condition worsened. They took her back to hospital but she did not make it and died on the way to

hospital.

42. No one gave evidence that they saw the deceased Jane Wambua at the bar in question on 11th September 2011.

43. In count two, the deceased is Festus David Nzuki. PW10, the deceased wife said that her husband fell ill at around 7 am on 10th September 2011 at their home and was unable to go to work. He complained of pain in his entire body, was vomiting and could not do anything as he felt helpless. She took him to Ruiru District hospital on the said 10th September 2011, where he was treated and told that his liver had a problem. PW12 testified that she was with the deceased, who is her brother-in-law, together with her husband Stephen Nzuki at the Mtongwe Club on the 10th and 11th September, 2011.

44. In count three, the deceased is David Karanja Nduati. No toxic substances were found in his specimens. PW7 told the court that he was with the deceased David Karanja and even slept on the same bed with him at Kenyatta National Hospital. PW7 said he was at the Mtongwe Club with the deceased Karanja together with others, Mwangi (PW8), Muiruri and others whose names he could not recall. They were all drinking alcoholic drinks at the club and in particular on 11th September 2011. PW8 confirmed that he too was at the said club drinking on the 11th September, 2011. He said after that drink he fell ill and was admitted for three days and treated for taking 'Bad' alcohol.

45. PW15 corroborated the evidence of PW7 and testified that he saw Karanja at the Pub on 11th September 2011 when he too had gone there for a drink.

46. In count four the accused was charged with causing the death of Samuel Waweru Wanjiku. No toxic substances were found in his specimens. There is no evidence adduced to show that the deceased was at the pub on the 11th September 2011.

47. In count five the accused is alleged to have caused the death of James Mwita Wanjiku alias Francis Mwita aka Kamancha. PW15 testified that he was at the Pub on 11th and was with his friend Mwita aka Kamancha the deceased herein and others. He stated that the others died on the same day he survived and lived to tell the story.

48. In count six the accused was charged with causing the death of Julius Kariuki Mwangi. PW4 Solomon Mwangi Gitau was the father of Julius Kariuki Mwangi the deceased in count 6. He told the court that his son came back from work in the evening of 12th Sep 2011 at around 10pm staggering and making noise as he entered the house. He went to his bedroom and could not sleep as he was vomiting. When PW4 inquired from him what the problem was, his son told him that he had taken liquor at "**Wa Flora**" and that he was feeling very sick. PW4 said that he and his wife took their son to their room but he looked very sickly the whole night.

49. The following morning on 11th September 2011, they got a vehicle and took their son to Ruiru Sub-District Hospital where he was admitted and put on drip. He however did not improve and was later referred to Thika District Hospital. He however died on the way to hospital. PW4 reported the matter to Thika Police Station and took the body to Kenyatta University Mortuary.

50. PW15 who survived the ordeal testified that he was with the deceased Kariuki and others at Mtongwe pub drinking on 11th September 2011.

51. In count seven the accused is charged of having caused the death of Joseph Ndichu Kamau. The evidence of PW15 shows that the deceased was with him at Mutongwe pub drinking on 11th September 2011 where the illicit brew was being sold.

52. In count eight, the accused is charged of causing the death of Stephen Nzuki. PW12 Salome Wanjiku Mwangi was the wife of the deceased person. Though they were drinking together at the time they had

briefly separated from each other and were staying apart from each other. She was with her husband and his brother David Nzuki, the deceased in count 1, at Mtongwe Pub at about 6 am on 10th September, 2011 where they had gone to ***“unlock the alcohol of previous day”*** which meant that they had gone to take more alcohol after consuming some the previous day. They drunk until 9 am after which her husband escorted her to her place before going where he lived with his brother at a place called Gitambaa. She said that she returned to the Pub later at 7 pm and found her husband and his brother David there. The following morning on 11th September 2011 at 6 am, she went back to Mtongwe pub with her husband and drank up to 9 am. When her husband escorted her to her place at Murera. PW12 went to her husband’s place at 7.30 pm on the 11th and found him sick. They spent the night at his but at 4 am his condition worsened and he died. PW12 reported to the police who escorted his body to the mortuary.

53. PW12 said that when they returned from the mortuary, her brother in law David Nzuki also fell ill. She took him to Ruiru District Hospital where he was admitted and when she came back later in the evening to check on him, she found that he had died.

54. I find that apart from the deceased in counts 1 and 4 all the deceased in this case went to the Mtongwe bar on the 11th September, 2011 and took brew before falling ill

55. In regard to the issue whether the prosecution had proved that the cause of the death of the deceased persons was illicit brew sold at Mtongwe club or Kings Pub? I have found that the prosecution adduced sufficient evidence to show that apart from the deceased in counts 1 and 4, all the other deceased persons were at the club known as ‘Mtungwe’ or ‘Mutongwe’ on the 11th September, 2011 and that they did partake of alcoholic drinks.

56. In regard to the issue whether the prosecution had established that the bar known as Mtongwe Club or Kings Pub was owned by the accused? Mr, Njugi’s submission was that none of the witnesses testified that they saw the accused at the bar on that day. That they instead said that some young people are the ones who served them. That further the accused had denied owning such an outfit.

57. There was clear evidence of who owned Mtongwe bar. PW15 testified that on the day in question he went to Mtongwe bar. He stated that Mtongwe was the name given to the home of Mama Flora. PW15 testified that it was Mama Flora’s house which was known by that name and he identified the accused in court as she. He said that he was a frequent customer at the accused house for a period of 3 years. He said that for that period, he had bought brew at her house.

58. There was other evidence from the area Senior Chief, PW3. He testified that the accused was a resident of the location where he served as Chief. She had resided there for five years. He stated that he knew her very well and stated that she used to sell illicit brew that is chang’aa before going into bar business. He said that he was involved in this case from the 13th September when he got a report the accused had been seen. He visited her house and found only empty tanks smelling of brew but he did not seize them. These could have formed important investigation material had the containers been taken to the Govt. Chem. for analysis.

59. I find that the prosecution had adduced sufficient evidence to show that the accused owned the place known as Mtongwe where some of the deceased in this case visited on the day in question and took brew. In fact there was further evidence from witnesses including PW7 that it was not the accused but two people she had employed who sold the illicit brew at her house. The accused defence that she did not own Mtongwe is not true. From the evidence of PW15, Mtongwe was actually her house where she lived and it is from there that she sold illicit brew.

60. As to the issue whether the evidence adduced by the prosecution had established that the accused had malice aforethought? The defence submitted that there was no evidence Mtongwe bar belonged to the accused. That is not correct. The evidence of PW3 and 15 links the accused to the bar and shows that in fact it was her house she had turned into a bar. Mr. Njugi also argued that there was lack of exhibits from the bar, that no witness saw the accused selling any brew and that the accused was not present on the

material day and therefore malice aforethought was not proved.

61. Ms. Mwaniki for the State urged that malice aforethought could be established from the fact the accused sold the brew with lethal levels of methanol. Counsel submitted that under **section 206** of the **Penal Code** even indifference that the action causing death may cause death is sufficient.

62. In this case we have the evidence that the illicit brew was being sold at the accused premises which she used as her home. There is evidence that those who sold the brew were her employees. The accused as owner of the brew bears the full responsibility for anything that occurs from the consumption of it. There is direct connection between the consumption of the brew and the deaths of the deceased persons. The brew had high, in fact lethal levels of methanol and that is what caused the deaths of the deceased in this case. She is culpable for having sold lethal brew which caused the deaths of most of those who consumed it. See the **Alcohol Drinks Control Act, Cap 121**. I find malice aforethought was proved.

63. Whether the prosecution proved motive for the offence, and whether motive is an essential ingredient for this offence? In **Choge vs Republic (1985) KLR 1**, the court of appeal quoted **section 9(3)** of the **Penal Code** held as follows:-

“Under section 9(3) of the Penal Code (cap 63) , the prosecution is not required to prove motive unless the provision creating the offence so states, but evidence of motive is admissible provided it is relevant to the facts in issue. Evidence of motive and opportunity may not of itself be corroboration but it may, when taken with other circumstances, constitute such circumstantial evidence as to furnish some corroboration sufficient to establish the required degree of culpability. The evidence of the ill-feeling between the deceased and the 1st appellant would have been a corroborative factor if the other evidence had been satisfactory which it was not.”

64. There was no evidence on the motive adduced in this case. It is obvious that the accused was doing business and she was totally indifferent as to what the brew she was selling may cause to her customers. The lack of motive does not vitiate the evidence adduced in this case. I find that it is not essential to prove motive in order to prove the charge of murder in this case.

65. Having considered all the evidence adduced in this case and the submissions of counsels and the authorities quoted I find that, except for counts 1 and 4, where there was no evidence the deceased visited her house for the brew, and counts 3 and 4 where no methanol was found in the specimen removed from the deceased in those counts, the prosecution has proved that the accused sold brew to the deceased which had lethal levels of methanol which resulted in their death. I find that the prosecution has proved counts 2, 5, 6, 7 and 8 beyond any reasonable doubt. I reject the accused defence in total, find her guilty of murder contrary to **section 203** of the **Penal Code** as charged. I convict the accused as charged in counts 2, 5, 6, 7 and 8 under **section 322** of the **Criminal Procedure Code**.

SIGEND AND DELIVERED AT NAIROBI THIS 28TH DAY OF JULY, 2016.

LESIIT, J.

JUDGE