



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
CRIMINAL CASE NO. 49 OF 2007

REPUBLICPROSECUTOR

VERSUS

JEREMIAH MAINA MURAGEACCUSED

JUDGEMENT

The accused **JEREMIAH MAINA MURAGE** faces a charge **of MURDER CONTRARY TO SECTION 203 as read with SECTION 204 OF THE PENAL CODE.** The particulars of the charge were that:-

“On the night of the 17th December, 2006 and 18th December, 2006 at Muguaya Estate Nakuru in Nakuru District within Rift Valley Province murdered BEATRICE WAMBUI MWANGI”

The accused entered a plea of ‘**Not Guilty**’ to the charge. Although he was first arraigned in court on 23/5/2007 the accused’s trial did not commence until four (4) years later on 14/11/2011. The first trial judge **Hon Justice William Ouko** (as he then was) heard the first three (3) witnesses. Thereafter **Hon Justice Anyara Emukule** took over the hearing on 24/6/2013 and heard the 4th and 5th prosecution witness. Following the transfer of **Justice Emukule**, I took over the case as the third judge to handle the matter and heard the evidence of the remaining four witnesses. In total nine (9) witnesses testified for the prosecution.

Briefly the facts of the case were that the deceased was an elderly lady and lived in Muguaya Estate. She had rental houses and the accused was one of her tenants. Shortly prior to this incident the accused became unable to pay his rent and defaulted for several months. The deceased as the landlady locked his house due to the non-payment of rent.

PW1 ANNE MUTHONI NJENGA a daughter in law to the deceased told the court that on 11/12/2006 she visited the deceased in her house. She found the deceased well and left her alive. On 17th December, 2006 at 8.00am **PW2 MARY NJERI KARANJA** a daughter to the deceased received a call informing her that her mother’s door was locked and the deceased was not being seen within the compound. **PW2** rushed to the residence of the deceased.

PW3 JOSEPH KARIUKI was a son to the deceased. He told the court that on 16/12/2006 he was with the deceased in her home until 6.30pm. The deceased requested **PW3** to come the next day to assist her

harvest her potatoes. The following day on 17/12/2008 **PW3** went to his mother's house at 7.30am. He found her door locked and the cattle had not been milked. **PW3** called out to his mother but received no reply. He checked the grill on the wooden door and noted that it was not bolted. **PW3** became alarmed and removed a window pane. He peeped into the house and saw that it was in disarray with items scattered all over. **PW3** called his sister **PW2** and when she arrived they entered the house. They entered the bedroom and upon lifting up her mattress they saw the body of the deceased lying under the bed.

The matter was reported to police who came to the scene. They took the body to Nakuru Municipal Mortuary. Police commenced investigations into the matter. Certain household items said to belong to the deceased were later recovered and the accused was said to have been the one who sold those items. He was then arrested and charged.

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

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

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

In order therefore to prove the charge of murder the prosecution must tender evidence to prove the following crucial ingredients of the offence beyond reasonable doubt.

1. Proof of the fact as well as the cause of death of the deceased
2. Proof that the deceased met her death as the result of an unlawful act or omission on the part of the accused.
3. Proof that said unlawful act or omission was committed with malice aforethought.

The first ingredient was readily proved. **PW1**, **PW2** and **PW3** all children of the deceased confirm that they recovered the body of their mother lying dead under her bed inside her house.

All these witnesses who knew the deceased well identify her as **‘Beatrice Wambui Mwangi’**

Evidence regarding the cause of death was tendered by **PW6 DR PAUL GACHONGA** a medical officer practicing in Nakuru. He told the court that on 19/12/2006 he conducted an autopsy on the body of the deceased at Nakuru War Memorial Hospital. He noted fractures of the neck bone and the spinal cord had been cut into two. **PW6** opined that the cause of death was **“cardio-pulmonary collapse secondary to cervical cord transection secondary to neck trauma”**. He filled and signed the post-mortem report which he produced as an exhibit **P. exb 11**. The doctor informed the court that a twist to the neck may cause the kind of injury noted on the body of the deceased. This was expert medical evidence – it was neither challenged nor controverted. I find that the deceased met her death due to being strangled and having her neck broken.

Having proved the fact and cause of death, the prosecution must go further and avail evidence to prove that it was the accused who twisted and broke the neck of the deceased resulting in her death. As stated earlier the accused and deceased were known to each other. The deceased's children testify that the accused was a tenant in their mother's compound. In his defence the accused readily conceded to the fact that the deceased was his landlady. **PW1** also informed the court that the house of the accused had been locked due to non-payment of rent. Once again the accused in his defence readily admits that his landlady had locked his house with all his belongings inside as he owed her rent arrears.

There was no witness who saw the accused murder the deceased. Indeed there was no witness who has

testified to having seen the accused in the company of the deceased shortly before she died. No witness saw accused in or near the deceased's house on the night of 16th December, 2006.

PW4 DAVID GITU who was also a neighbor of the deceased told the court that on the evening of 16/12/2006, he and two of his friends visited the deceased whom he referred to as 'shosho' in her house. They took tea together and the trio left to go to bed. **PW4** stated that when he visited with the deceased she was jovial and he left her alive and well. The next morning the body of the deceased was found dead under her bed.

The prosecution here seeks to rely on circumstantial evidence to link the accused to the murder of the deceased. In the case of **REPUBLIC Vs TAYLOR WEAVER & DONOVIAN 1928** the principle regarding the application of circumstantial evidence was enumerated as follows

"Circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which by intensified examination is capable of proving a proposition with the accuracy of mathematics. It is no derogation of evidence to say it is circumstantial"

In the case of **KARIUKI KARANJA Vs REPUBLIC [1986] KLR**, the court held that

"In order for circumstantial evidence to sustain a conviction, it must point irresistibly to the accused and in order to justify the inference of guilt on such evidence the inculpatory facts must be incompatible with innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt. The burden of proving facts justifying the drawing of that inference is on the prosecution"

In this case it is alleged that certain items belonging to the deceased were recovered. The recovery of these items was linked to the accused.

PW1 a daughter-in-law to the deceased told the court that after the death of the deceased she was called to the CID offices in Nakuru. There she identified several household items belonging to the deceased. These included sheets, chair covers, assorted utensils, a TV set, curtains wall pictures, DVD player, Bible etc. **PW1** told the court that she could identify all these items very well because she had lived with the deceased for a period of 7 months and had seen those items inside her house. **PW2** the deceased's daughter also identified the recovered items as belonging to her late mother. The circumstances surrounding the recovery of those items then become a critical factor.

PW7 ZACHARIAH NDUNGU NJERI told the court that he knew the accused as a fellow church member. Sometime in February, 2007 the accused came to **PW7** and asked for financial assistance as he needed money to pay rent for his house which had been locked. **PW7** initially gave accused Ksh 300/=. Later accused came and offered to sell to **PW7** some bed sheets. They agreed on a price of Ksh 750/= and **PW7** took the bed sheets. Later police came and arrested **PW7** and interrogated him about the bed sheets which he had purchased from the accused.

The green-flowered bed sheets were produced as exhibits **P.exb16**. **PW7** identified them as the bed-sheets he had purchased from the accused. **PW1** and **PW2** identify the bed-sheets as belonging to the deceased. The bed sheets were ordinary bed-sheets. There was no specific or peculiar mark to identify them as belonging to the deceased. They were ordinary bed-sheets and I have no doubt that a similar pair could be found in any household across the county. There is no evidence connecting these bed-sheets to the deceased.

It must be remembered that the deceased was killed in December, 2006. It was not until February 2007 that **PW7** said the accused sold him the bed-sheets. Given the passage of time and given that bed-sheets are fairly cheap items which are quickly disposed of, the fact that accused possessed the sheets more than 30 days after they were stolen from deceased, would not amount to sufficient evidence to link him to the murder.

Then there is the evidence of **PW8 MILKA WAITHERA**. She told the court that sometime in 2007 **PW7** brought the accused to her. The accused told **PW8** that his house had been locked and he needed money to pay his rent arrears. He requested **PW8** for a loan. **PW8** (who evidently was a money lender commonly referred as a ‘shylock’) agreed to lend accused Ksh 3,500/= on condition that he provide some guarantee for the loan. Accused then gave **PW8** a DVD player in a bag. Later police came to the house of **PW8** and collected the DVD player claiming that it belonged to a lady who had been murdered. **PW8** told the court that she never opened the bag to look at the DVD player. Thus she is not able to identify the DVD player produced in court as the one which accused brought to her.

PW1 and **PW2** identify the DVD player as one belonging to the deceased. No receipt has been availed as proof of its purchase and/or ownership. The serial number was not identified. Once again this is a common DVD player which could be found in any home in the country. It had no specific or peculiar mark identifying it as belonging to the deceased. Given that **PW8** was unable to identify this exhibit the chain of evidence has been broken. There exists nothing to link the DVD player exhibited in court to the accused.

PW9 PC ABDUL RAHMAN was the investigating officer in this case. **PW9** told the court that the accused led him to his house in Karatina area where the items said to belong to the deceased were recovered. **PW9** was remiss in not preparing an inventory of what he recovered in that house. There is no proof that the house in Karatina area belonged to the accused. **PW9** admits that he made no enquiry from the landlord to determine if it is accused who rented that house.

Further **PW9** appears to contradict the evidence of the previous witnesses. He insists that accused was a worker employed by the deceased whereas the children of deceased had stated that the accused was merely a tenant of their late mother. Also **PW9** equally insists that accused lived in the deceased’s servant’s quarters and that that the deceased did not have any rental rooms in her compound. This contradicts the evidence of **PW1**, **PW2**, **PW3** and **PW4** who all testify that the deceased had several rental rooms in her compound. **PW9** insists that it was only accused and deceased who lived in the compound yet **PW4** told the court that his parents were also tenants in the same compound. One is left wondering whether **PW9** was sure about the facts of the case which he was investigating.

Finally **PW9** told the court that the accused confessed to him that he had killed the deceased. The law regarding the admissibility of confessions is very clear and is to be found in Section 25A(1) of the Evidence Act Cap 80 Laws of Kenya. This Section provides that

“25A(1) A confession or any admission of a fact tending 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 person’s choice” (my emphasis)

This alleged admission made by the accused to **PW9** is inadmissible on several fronts. Firstly the accused was not properly cautioned before making such admission. Secondly **PW9** was a Police Constable at the time and had no mandate to record or receive a confession. Thirdly, as the investigating officer **PW9** could not receive admissions from the accused. No caution was administered to the accused before he made this alleged ‘confession’. Therefore the court will have no regard to this purported oral confession by accused.

Based on the foregoing it is evident that accused was suspected in this murder because he owed the deceased rent arrears and it is alleged that he disappeared after the incident. Given that the house of accused had been locked, he could no longer reside in that compound so how could he be expected to have been there at the material time. **PW9** said he found accused and his wife in the local market. A person who is said to have absconded would hardly be consorting with his wife in the local market. I reject the notion that the accused absconded following the murder of the deceased.

My conclusion is that the evidence adduced lacked cogency and does not in any tangible way link the

accused to the murder of the deceased. The *actus reus* for the offence of murder has not been sufficiently proved. The threshold of proof being beyond reasonable doubt had not been met. I therefore 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 19th day of December, 2016

Maureen A. Odero

Judge

Mr. Obutu for Accused

Mr. Motende for DPP