



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
CRIMINAL CASE NO. 6 OF 2011

REPUBLIC.....PROSECUTOR

VERSUS

PETERSON NJUGUNA GITHUI.....ACCUSED

JUDGMENT

1. Peterson Njuguna Githui (the accused) is charged with the offence of murder contrary to Section 203 as read with **Section 204** of the **Penal Code (Cap 63, Laws of Kenya)**.
2. The prosecution alleged that the accused on unknown dates between 5th January, 2011 and 15th January, 2011 at Ngomongo Village within Nyandarua County, murdered Esther Wachira Kihara.
3. To prove the offence of murder, the prosecution must establish by evidence that the offence was committed with malice aforethought (**Section 203**), and that such malice aforethought is established in evidence by reference to the circumstances prescribed under **Section 206** of the **Penal Code**, namely:-

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.

4. To establish these ingredients of the offence of murder the prosecution called eleven witnesses. I will begin with the evidence of PW10, the Doctor, who carried out the post-mortem on the body of the deceased on 20th January, 2011, that is 15 days after the deceased went missing and the body was so badly decomposed and in various pieces that it was impossible to do an internal examination. Despite the condition of the body, the witness was able to establish what he described as multiple cuts on the shoulder, hip and knee joints and that the head was decapitated, the hands were missing, having been severed along the shoulder joints.

5. The Doctor put the cause of death to multiple injuries coupled with decapitation of the head leading to pulmonary arrest.

6. To the question in cross-examination whether there was a **post-mortem** in light of the badly decomposed body, PW10 responded that despite the advanced decomposition of the body, it was still possible to carry out the post-mortem. Dr. Waiti who carried out the post-mortem and on whose behalf PW10 testified relied on the external injuries, coupled with the decapitation of the head.

7. In re-examination, PW10 testified that a post-mortem comprises *inter alia*, **firstly** a brief history of the death, by the investigating officer as the body is brought in, **secondly**, there is an identification by at least two relatives of the deceased and police officer, **thirdly**, where there is an allegation of trauma, the body is examined both externally and internally. In this case the body was in a dam for more than 10 days.

8. Before the post-mortem, the body was identified by pW1 (when recovered from the dam) and PW3. There was thus a killing an *actus reus*. The question is whether the killing or death was caused by the intention and act of the accused. To answer that question the following was the testimony of the other witnesses.

9. PW1 was a neighbour of the accused and deceased for ten years. He had seen them on 5th January, 2011, when he had gone to collect his “jogoo” (cock) from the accused’s house. He heard some noises from the gate of the accused between 5.45 a.m. to 6.00 a.m. on 6th January, 2011, and that the accused told him that he had escorted his wife to school but had not seen either him or the wife being escorted.

10. The accused had, however, informed him that he had been called by the wife’s sister concerned about his wife’s disappearance. They went to console and pray with the accused and they advised him to report the matter to the police. The accused was declared as a suspect when he went to the Police to report about his missing wife.

11. PW2, the mother of the deceased testified that her daughter had returned to her home in Karatina in September, 2010 complaining that her husband, the accused, had refused to pay school fees for her daughter, Jane Wangechi Njuguna who was then in Form 1 at Gatero Secondary School. She was followed by her husband, the deceased who asked for dialogue with the deceased. The deceased, however, refused. After staying overnight, the accused left. It was PW2’s testimony that upon her advice, her daughter went to visit her sister, Anne Wangui Kihara (PW7) in Kitengela and later returned with her daughter and had her treated for eye infection at Nyeri General Hospital and that child went back to school.

12. It was PW2’s further testimony that the deceased went to see her on 3rd January, 2011 and informed her that she wanted to go to Nyahururu to collect her daughter’s result slip and transfer letter and that she proceeded to Nyahururu on 5th January, 2011 but that before leaving, she had a telephone conversation with a person she thought was her husband, the accused. The deceased called her at about 6.40 p.m. on that date, but the battery was low and they were unable to communicate.

13. It was also her testimony that she telephoned PW7 (her other daughter) on 6th January, 2011 and that her daughter informed her that her sister’s phone was off the air. PW2 then called her other daughter, PW5, in Nakuru to call Gatero Girls School and ask whether the deceased had gone to the school to collect her daughter’s transfer letter. She was informed that the deceased had not arrived at the school. The accused, however, informed her that he had escorted her on the morning on 6th January, 2011 to the bus stage to go to Gatero Secondary School. Thereafter she instructed her son, Ephraim Kimani Kihara, to report to Nyahururu Police Station and on the same day, 15th January, 2011, an announcement was made over the radio that her daughter’s body was found dumped at Kamwana Dam.

14. PW3 testified that he was telephoned by his sister, PW5 that his other sister, the deceased, who had gone to Nyahururu had not returned, had not been seen and her cell-phone was not being answered. It was his testimony that on 9th January, 2011 he together with the accused went to the Nyahururu Police

Station, and went to the home of the accused and did not find the deceased. They also searched his shamba in Ngomongo but found nothing.

15. It was PW3's testimony that on 15th January, 2011, the Police telephoned and informed him that a body had been found at Ngomongo Dam, without a head and half a leg and without arms.

16. Following up that information he went to the Police on 16th January, 2011 and in their company they went to the home of the accused and carried out a search and found the deceased's Voting Card, Women Poverty Eradication Card, and a purse with some Kshs. 3,935/=. They also found text books for Primary English for Class 5 and Primary Mathematics for Standard V.

17. In cross-examination, PW3 testified that the exhibits were recovered from under the mattress in the children's bedroom.

18. PW4's testimony was that she was called by her sister, the deceased on 5th January, 2011 at about 7.00 p.m. that she was with her husband as she was going the next day to collect school transfer Form for her daughter. However, on 6th January, 2011, she called and had no response from the deceased's phone, she called the accused who informed her that the deceased was not with him as she was used to walking away from him. It was her testimony that she was with her husband, a former Chairman of Nyahururu County Council, when she visited the accused's home on 7th January, 2011 and spoke to the neighbour's children who informed her that Mama "Roby" (Roby being a son of the accused and the deceased), was present on 5th January, 2011. Accused was asked by her husband whether he had looked for his wife anywhere, the accused replied that he had looked for her at various Police Stations, including Ol Joro Orok Police Station, Nyahururu Police Station and Nyahururu District Hospital without success and they reported the matter at Nyahururu Police Station on 8th January, 2011.

19. It was her testimony that a search in earnest then started from 8th January, 2011 and on 15th January, 2011 at around 3.00 p.m. her husband telephoned and informed her that a body had been found at Kamwana Dam not far from the accused's and deceased's house. She rushed to Nyahururu and with the aid of a taxi reached the Dam. She saw the body without arms, without a head floating far from the edge of the water and was recovered. She identified it as a body of her sister from the gap in her upper teeth. The waist was dressed in a 'khamis' (PEXh.3). The accused had been arrested on 14th January, 2011.

20. Her testimony also corroborated that of PW3 that a search was carried out in the house of the accused where there were found the accused's Voting Card (PEXh.1A), Poverty Eradication Card (PEXh.1B) and a purse containing Kshs. 3,975/= (PEXh.1C). She, along with PW3 and a Police Officer attended the post-mortem of the deceased.

21. PW4 reiterated her evidence when cross-examined by counsel for the accused. It was her testimony that at least two searches were conducted in the accused's house on 7th January, 2011 and 16th January, 2011 and that the accused was present on both occasions and that it was wrong for him to deny his presence.

22. It was also her testimony that the accused never called her, and on 5th January, 2011, she called her sister who informed her that she had come to collect some document from the house and that she was with her husband and that was the last time she spoke to the deceased's husband. She and other relatives suspected him with the murder of the deceased. He was the last person with the deceased. PW4 further testified that even the accused himself informed her that he was with the deceased on 5th January, 2011 and that the body was found about 300 metres from the accused's house.

23. When re-examined by the prosecution counsel, PW4 stated that the panga and axe were blood stained and that when she went to see the Principal of Gatero Secondary School, the Principal showed her the transfer form from the school still on her desk.

24. It was the testimony of PW5, the daughter, (the subject of the transfer from Gatero Secondary School), that following the burial of her aunt in Nyeri on 17th August, 2010, she went and stayed with an aunt, a younger sister of her mother in Nairobi, along with her mother. Thereafter her mother went back to Nyahururu where she ran a business.

25. However, after the August School holidays, she went back to her home in Nyahururu where her father, the accused informed her that he would no longer pay for her school fees or shopping for school and that she used the money her aunt gave her to shop for school. In addition before she returned to school, her mother informed her that she would return to her grandmother, and that her mother together with her aunt who also paid her school fees visited her later in school.

26. It was also her testimony that she and her mother took her holidays in Kitengela with another aunt (PW7), when her mother, the deceased, was to arrange in early January for her transfer from Gatero Girls Secondary School to another school. She travelled to Nyahururu and that she spoke to her, but cell-phone went off the air and they thought she had insufficient credit. They called her other aunt, PW4, to find out what had happened to her mother and they got no further information until 15th January, 2011 when she travelled to Nyahururu, and she was informed that her mother's body had been found and that she was required to go and identify it and that she did not know where her father the accused was as she did not visit her home.

27. It was PW5's evidence upon cross-examination by counsel for the accused that she had lived with her father (and mother) for nine years in Nyahururu. She did not know who was paying her school fees. Her father used to talk rudely without making reference to any one in particular. He never used to give her any money.

28. In her evidence to the best of her knowledge her father and mother never lived together from about September, 2010. Her mother went to Kitengela on 2nd October, 2011 and the last time she spoke to her was on 3rd January, 2011. Her mother never called her and that when she called her on 4th January, 2011, her mother's cell-phone was off. She used to be known as Jane Wangechi Njuguna but was now called Jane Wangechi Wachira. She could not say who killed her mother.

29. PW6, a Gazetted Scene of Crime Officer, took photographs of human flesh that were at the banks of Kamwana Dam:-

1. Photograph No. 1 – showed the head;
2. Photograph No. 2 – showed a torso;
3. Photograph No. 3 – showed part of a leg – that is a thigh;
4. Photographs 4 and 5 showed a general view of flesh in a stretcher.

30. PW6 produced his report and photographs as PExh.3A, B and C, D and E.

31. PW7 corroborated the evidence of her sister as well as her niece, PW5, that they had all assembled in Nyeri on 20th August, 2010, at the burial of her 4th born sister and that thereafter she returned to her residence in Kitengela. Her late sister visited her in September, 2010 and stayed with her until 3rd January, 2011, when she left for Nyeri and from Nyeri, went to Nyahururu to arrange for transfer letters for her children to Nyeri schools. It was her evidence that her sister did not succeed to do so.

32. It was PW7's testimony that she called her on 5th January, 2011 and found her telephone engaged. Upon a second call, she answered and told her in a faint voice and sound that she would call her again. PW7 called her sister again on 6th January, 2011 at 6.00 a.m. and her phone was on "mteja mode", that she could not be reached. Desperate, she called her sister, Jane Wangechi Mburu (PW4) and informed her that she could not reach her sister (the deceased) as her cell-phone was on "mteja mode". Later her

sister's husband informed her that the accused had told him that her sister, the deceased had gone to school. Her sister's inquiries however, had established that the deceased was seen with the accused on 5th January, 2011 and had informed them that they would see her again, but had not seen her on 6th January, 2011.

33. PW7's efforts to find out further information from neighbours including any information from the accused proved unsuccessful. All the accused insisted on was that he had escorted the deceased to get a bus to go to Gatero Secondary School on 6th January, 2011. It was also her testimony that no information was forthcoming about the deceased's whereabouts until 15th January, 2011 when she received information that her sister's body had been found at Kamwana Dm. It was her further testimony that she travelled to Nyahururu on 16th January, 2011 and was present when the accused's house searched in the presence of the accused and the deceased's Voters Registration Card, Women Poverty Eradication Card and purse containing Kshs. 3,975/= and also text books: Primary English and Mathematics were recovered.

34. In cross-examination by counsel for the accused, it was the testimony of PW7 that though she does not know who killed her sister, she suspected the accused because her sister spent the night in his house and she was on the next day, supposed to go to Gatero Secondary School to collect transfer letters and also because the accused had informed the police and other relatives that he had escorted the deceased to the bus stop. But the deceased could not have left without the purse and the money and even if one had other money she could not leave without her "*kibeti*" (purse), it is not usual for a lady to do so.

35. It was the testimony of PW8 that on 8th January, 2011, he received a report from the accused that he had on 6th January, 2011 at about 6.00 a.m. escorted his wife, the deceased, to Ngarua bus stage to take a bus to Gatero Secondary School where she was expected to collect a letter of transfer of her two children to Nyeri school and that she had not been heard of either at the school where she was to collect the letter or among her relatives in Nairobi where she used to reside.

36. It was also PW8's testimony that the next day on 9th January, 2011, he together with CID Officers, Corporal Mwanzia, Corporal Kosgei and the accused proceeded to the accused's house and carried out a search and found no clear leads as to the disappearance of the deceased. They, however, collected some photographs of the deceased and returned to the station where he drafted and sent out a signal to all Police Stations that the deceased was missing and calling for any information on the person to be sent to them or any nearest Police Station.

37. However, even before they got a response to their signal, the accused was taken into custody, as investigations were enhanced until 16th January, 2011, when he received information from his CID colleagues that a body of the deceased had been found cut into pieces and thrown into a dam not far from the deceased's home.

38. Following that information he and his CID colleagues in the company of the accused went to the house of the accused and conducted a further search and one of his colleagues, Corporal Nyakibondo (PW11) managed to recover a purse in the bedroom of the children placed under the mattress on the bed, the purse contained an Elector's Card, Women Poverty Eradication Card and cash of Kshs. 3,975/= and two text books – Primary English and Mathematics. The officers recovered an axe, and a panga. Thereafter the officers from CID completed investigations and charged the accused. He made an inventory of the items recovered (PEXh.5) and also produced the signal he prepared (PEXh.4).

39. Upon cross-examination, PW8 reiterated his evidence in-chief. He was part of the investigating team which conducted a search of the accused's house, but the search did not give any leads as to the disappearance of the deceased and no search warrant was required. It was the accused himself who made a report of the missing person and the circumstances of her disappearance, that the search of 9th January, 2011 did not yield any leads to the deceased's disappearance. The axe and panga were taken from the house, and between the time the accused reported his missing wife until he was arrested on 15th January,

2011, he was required to report to the station regularly

40. PW11 was Corporal Silas Nyakibondo. He was instructed by his superior, the DCIO to take over investigations on the missing person on 15th January, 2011, where he also arrested and detained the accused while carrying out further investigations. He proceeded to the scene of the crime, Ngomongo area of Nyahururu Town upon receiving information at about 4.00 p.m. that a body had been seen floating in Kamwana Dam where he met the OCS, Ol Joro Orok, CIP Alan Ogola and recovered the body pieces, one hand, decapitated head and other parts and had them transported to Nyahururu District Mortuary. The body parts were those of a female.

41. PW11 also corroborated the evidence of PW8, that they went along with the accused for a further search of his house where they recovered:-

a. A black wallet containing Kshs. 3,975/=

b. An Elector's Card for the deceased;

c. An Identification Card for Women Poverty Eradication programme;

d. Two text books, Primary Mathematics and Primary English for Standard for the accused's son, Robinson Githui (which the mother, the deceased, had come to collect as the accused and the deceased had already been separated).

42. An inventory of those items was drawn and signed by both him and the accused, one of his colleagues and one other witness.

43. The missing thigh was recovered on 17th January, 2011. The other parts of the body were not recovered as the dam was very deep. The second item was produced as PExh.4.

44. In cross-examination, PW11 admitted that he did not have a search warrant when he went to the accused's house on 16th January, 2011 as they had the consent of the accused. He established that the accused had spent the night in the house with accused before her disappearance. It was very odd for the deceased to leave her wallet if she was travelling normally.

45. PW11 testified that the head was completely separated from the rest of the body and it had been with other parts of the body by wananchi (residents) as the Police did not have diving equipment. They did not have the opportunity to look at internal parts of the body. The conclusion of their investigations was that it was the accused who had killed the deceased. PW11 ruled out any possibility of the killing of the deceased by members of Mungiki as indeed the area is infested by the sect. He had escorted his wife to the stage and he did not say whether he was accosted by Mungiki. PW11 opined that the accused hid a lot from him as to how his wife disappeared.

46. In re-examination by prosecution counsel PW11 replied that the relationship between the accused and the deceased had not been good. Though their relationship of husband and wife was acknowledged, it was relatives of the deceased (sisters-in-law of the accused) who pushed the accused to report that his wife was missing. They accompanied the accused to Nyahururu Police Station. They were suspicious of his conduct when he chose to take some calls and refuse others.

47. At the close of the evidence of PW11, the prosecution closed its case and asked for an order that the wallet and the contents thereof (PExh.1A, B, C and D) be handed over to the relatives of the deceased and there being no objection thereto, the said items were handed over to the deceased's relatives with a direction that they be signed for. With the end of the evidence of PW11, the prosecution closed its case, and there being no submissions from counsel for the accused on whether or not there was a case to answer to, I put the accused to his defence and reminded him of his Constitutional and Statutory rights under Section 306(2) of the **Criminal Procedure Code (Cap 75, Laws of Kenya)**. Counsel informed the court that the accused would tender sworn evidence.

48. The accused's testimony corroborated the most salient points of the prosecution witnesses' evidence. They married in 1999. They had one child (the first child came with the deceased when he married her). They lived well until August, 2010, when they separated. They met in September of that year to seek reconciliation but they did not succeed. He confirmed he was with the deceased on the evening and night of 5th January, 2011. He maintained the story that he escorted his wife to Ngarua bus stage in Nyahururu Town and left his wife there; that he spoke to his wife on telephone later and she told him that she had not yet got a vehicle and that that was the last time he spoke with her.

49. It was the accused's evidence that he searched for his wife between 6th January, 2011 and 8th January, 2011 everywhere, at Nyahururu District Hospital, Ol Joro Orok Police Station and Gatero Secondary School, all without success. He testified that he called PW4 to come to Nyahururu to help him search for his wife; and confirmed that PW4 came with her husband and continued the search and that he was arrested on 13th January, 2011 and was informed that the complainant was his wife's family. The accused also corroborated the evidence of PW11 that the PExh.1A, B, C and D were recovered from his house and explained that it was not unusual to hide the items under the mattress as they had been attacked on one occasion and robbed. The accused confirmed knowledge of Kamwana Dam, which he put at 4km from Ngarua bus stage in Nyahururu Town. He denied being involved in, and that he did not kill his wife. He appealed to the court to look at all sides of the evidence.

50. When cross-examined by counsel for the prosecution, the accused responded that he was with the deceased on 5th January, 2011 and 6th January, 2011, when the deceased was to take a motor vehicle to Gatero Secondary School. He confirmed that the purse was found in his house and that he had indeed made a report concerning his wife's disappearance but that it had not been entered in the OB.

51. With the testimony of the accused, the defence closed its case and applied to file written submissions on behalf of the deceased. His submissions dated 17th December, 2014 were filed on the same day.

ANALYSIS OF EVIDENCE AND SUBMISSIONS OF COUNSEL

52. In the case of **OUMA VS. REPUBLIC [1986] KLR 619**, the Court of Appeal held:-

“At the time of evaluating the prosecution's evidence, the court must have in mind the accused person's defence and must satisfy itself that the prosecution had by its evidence left no reasonable possibility of the defence being true. If there is any doubt, the benefit of that doubt always goes to the accused person. That did not appear to have been done in this case.”

53. In his submissions, counsel for the accused posed the following issues for determination by the court:

- 1. Whether the prosecution had established the requirements of Section 206 of the Penal Code for the proof of murder and if so,**
- 2. Whether the prosecution proved its case beyond reasonable doubt, or**
- 3. Whether this case should be dismissed and the accused acquitted.**

54. It was the submission of counsel for the accused that the prosecution had failed to prove the charge of murder against the accused essentially on the grounds that:-

- 1. PW1 stated that he had heard of no dispute between the accused and the deceased, and did not know who killed the deceased. PW2 could not say who killed the deceased;**
- 2. PW3 testified that they did not find anything linking the accused to the killing of the deceased;**
- 3. the evidence of PW4 had material contradictions as to the place of recovery of PExh.1A, B,**

C and D;

4. the evidence of PW5 had no evidential value;

5. PW7 merely suspected the accused as the killer of the deceased;

6. PW8 received the first report from the accused himself;

7. PW9 and PW10 testified as to the carrying out of the post-mortem;

8. PW11, the Investigating Officer charged the accused on mere suspicion and never found any evidence linking the accused with the murder of the deceased;

9. the defence was credible, that he escorted his wife to the bus stage at Ngarua in Nyahururu at 6.00 a.m. He made a report on 8th January, 2011, voluntarily and not at the behest of his in-laws, that he had no bad blood between him and the deceased and had no reason to kill his wife.

55. On the evidence, counsel submitted, there was doubt as to whether it was the accused who committed the murder for which he was charged.

OPINION

56. There is no doubt that there is no direct evidence that it is the accused who murdered the deceased. The authorities resting with **REPUBLIC VS. THOMAS BOKE MBIRU [2014] eKLR** holds sway that:-

“Suspicion however strong, cannot provide the basis of interring guilt which must be proved by evidence beyond reasonable doubt.”

57. There is no direct evidence, and mere suspicion cannot be a basis for conviction. Is there circumstantial evidence upon which guilt can be inferred upon the accused? Counsel for the accused submitted that there is no such evidence and had two major grounds for submitting so. **Firstly**, the prosecution did not ascertain the date of death of the deceased and consequently it cannot be known when the murder took place as the deceased disappeared on 6th January, 2011 and her body parts were recovered on 15th January, 2011. **Secondly**, counsel for the accused submitted, that no weapon was recovered and that failure to recover the weapon was fatal in that the accused’s malicious intention cannot be inferred, that there is no evidence that the accused had malice aforethought. Counsel relied on the cases of **REPUBLIC VS. JONATHAN KITARI M’MITHIARU [2014] eKLR** and **REPUBLIC VS. DAVID MIRARA GICHURU & ANOTHER [2009] eKLR**. **Thirdly**, counsel argued that there was no post-mortem on the internal organs to determine the cause of death, that there was no examination of the heart to determine that there was a pulmonary arrest.

58. I will take each of these objections in turn. On the question of the time of death, I must say that our forensic examination of evidence leaves a lot to be desired. It may be due to our scientific backwardness or sheer unwillingness to be meticulous in our investigations of crime or both. But whichever or whatever cause it is, the duty of the court is to analyze and evaluate the evidence presented to it before inferring the time of death and the most probable cause of the injuries that caused that death.

59. In this regard therefore the evidence of PW2, PW1, PW4 and PW7 is critical. Also critical is the evidence of the accused.

60. It was the testimony of PW2, the mother of the deceased, that her daughter, the deceased, visited her in September 20, 2010 and informed her that her husband the accused had refused to pay school fees for her daughter (PW5), who was then in Form 1 in Gatero Secondary School. It was her testimony that the husband, the accused whom she regarded as a son-in-law followed the deceased to her home, and asked

her for dialogue. He deceased declined. The accused spent the night at her home and left the next day without the deceased.

61. After PW2's urging her to find some work to do, the deceased went to her sister's place in Kitengela, near Nairobi, to see how she could raise fees for her daughter.. Fast-forward to January 2011, the deceased visited her again and informed her mother that she wanted to go to Nyahururu to collect her daughter's result slip and transfer letter to another school. Before she left to Nyahururu, her daughter telephoned someone she believed was her husband. She left on 5th January, 2011. The deceased called at about 6.40 p.m. but the cell-phone's batteries were low and that they did not communicate. Desperate calls were made to PW7 then to PW4, all on 6th January, 2011 at about the same time, that the daughter's cell-phone was off the air.

62. It was the evidence of PW1, a poultry keeper and neighbour of the accused and the deceased (whom he referred to as '*Mama Roby*') that he had a new rooster (cock) which had disappeared. He went to check for it at Mama Roby's house. He found Mama Roby in the kitchen sorting out some rice, while the accused was lighting some fire.

63. He explained his mission. He went looking for his '*jogoo*' (rooster) and that when the hens had entered their pen, "*I caught my jogoo and left*". It was also PW1's testimony that as he slept, he heard some noises and sneezing around 5.45 a.m. – 6.00 a.m. and banging at Peterson's (accused) gate and later in the morning the accused explained to him that he had gone to escort his wife to a girls' school – Gatero Girls Secondary School. The accused went to town. PW1 informed his mother that "*Mama Roby*" had gone to school but had not returned.

64. It was also PW1's evidence that the accused called him and informed him that he had been called by his wife's sister concerned about the disappearance of his wife. They went to his house and shared a prayer and thereafter advised the accused to report to the Police where he went and was detained. Upon visiting him the accused gave him his bicycle to take home.

65. It was the evidence of PW4 that her sister telephoned her on 5th January, 2011 at about 7.00 p.m. and informed her that she was with her husband and had gone to Nyahururu to collect School transfer Forms for her daughter. When her sister (PW3) from Kitengela called her on 6th January, 2011, that there was no response from her sister's phone, she visited the accused's neighbour who informed her and her husband that "***Mama Roby*** was here on 5th January, 2011.

66. It was the evidence of PW7 that she telephoned the deceased on 5th January, 2011, but found her telephone engaged. He called her again and she answered the phone and said "**wait, I will call you again**". Her "**voice sounded faint – it was not her usual voice.**" On 6th January, 2011, PW7 called the deceased again and found her phone on "**mteja**" mode – she could not be reached and called PW4, her sister to find out what was going on with her sister.

67. PW7 accompanied the Police (PW11) to the house of the deceased at which a search was conducted in the course of which a black wallet containing – (1) KShs. 3975/=, (2) an Elector's Card for the deceased (3) Women Poverty Eradication Identification Card and (4) Two text books.

68. Lastly, DW1, the accused corroborated materially the evidence of PW1, PW2, PW4 and PW7, that the deceased was in her house on the night of 5th January, 2011. He also corroborated the evidence of PW7 and PW11 as to the recovery of the wallet, the deceased's Elector's Card and Women Poverty Eradication Card.

69. The question of the time of death is with respect to counsel for the accused and to contrary opinion quite irrelevant. The body of the deceased was recovered on 15th January, 2011, that is to say, some 9 days after alleged disappearance. It was in advanced stage of decomposition and revert into its original matter, soil. I do not say alleged disappearance because that is an excuse or defence which was coined by the accused to hide an intentional and malicious act of murder by no other person other than the accused.

There is no other eye witness, apart from the accused. He will neither confess nor incriminate himself. He could not and cannot hide from the tell-tell signs. It is called circumstantial evidence; evidence of all surrounding circumstances which proves a proposition with the accuracy of mathematics.

70. The accused and the deceased were married in 1999 and had been husband and wife for just ten or so years. In the 10th year of his marriage, the accused chose to inform his daughter, PW5, not his wife, the deceased, that he would no longer pay for her school fees. Eventually her aunt (PW7) paid her fees. The child did not ask for any reasons. Her mother, the deceased informed her that she would return to her mother (PW2) in Nyeri – Karatina. This is evidence of poor relationship between the accused and the deceased

71. When the accused visited the deceased in her mother's house and sought dialogue or reconciliation with his wife, that she return to him in Nyahururu and though PW2 treated him as a son-in-law, the deceased refused.

72. The accused got opportunity to see his wife again in January, 2011. According to the evidence of PW2 (the mother), her daughter spoke to someone, whom she suspected was her husband and indicated that she would be coming to Nyahururu. She did. That is the evidence of the accused himself, and PW1, a neighbour. The deceased called the mother at 6.40 p.m. on 5th January, 2011, that her cell batteries were low, they could not communicate. She called her sister at about 7.00 p.m. that she was in Nyahururu to collect her daughter's school transfer forms. PW1 confirmed to her that the deceased was with the deceased on the night of 5th January, 2011. Lastly, items of personal value, which the deceased must have been carrying along in her purse, were found hidden under a mattress in their children's bedroom. Whereas it is acknowledged that the two text books found in the living room had been left there before, there is no explanation as to why the deceased, whom the accused alleges he escorted at between 6.45 a.m. and 6.00 a.m., to Ngarua Bus Stage in Nyahururu Town, would leave her purse, and personal items in the house.

73. Of course dead people tell no tales, but I would, with respect, agree with the opinion expressed by PW7:-

“My sister could not go without her pouch and the money. I would not know whether she had other money and she could not leave without her “kibeti” (pouch). It is not usual for a lady to do so.”

74. The credibility of a witness depends *inter alia* upon:

1. his knowledge of the facts to which he testifies;

2. his disinterestedness;

3. his integrity;

4. his veracity

5. his being bound to speak the truth by such as an oath as he deems obligatory or by such affirmation or declaration as may by law be substituted for an oath.

75. Proportional to these tests of credibility of a witness is the degree of credit the testimony of a witness deserved from the court. The question here therefore is what credibility is to be conferred upon **firstly**, the evidence of the prosecution witnesses, and **secondly**, the equally sworn evidence of the accused.

76. In the case of **OKETHI OKALE & OTHERS VS. REPUBLIC [1965] EA 555**, the court said:-

“In every criminal trial a conviction can only be based on the weight of the actual evidence adduced and it is dangerous and inadmissible for a trial Judge to put forward a theory not

canvassed in evidence or in counsel's speeches;the burden of proof in criminal proceedings is throughout on the prosecution, and it is the duty of trial Judge to look at the evidence as a whole."

77. This latter holding is a veritable echo of **Section 107 of the Evidence Act (Cap 80, Laws of Kenya):-**

"S.107(1) – Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person."

78. The Court of Appeal put the same proposition somewhat broadly in **SAWE VS. REPUBLIC [2003] KLR 364**, when it said:-

"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 hypotheses than that of his guilt. Circumstantial evidence can be a basis of a conviction only if there is no other existing circumstance weakening the chain of circumstances relied on. The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution. This burden always remains with the prosecution and never shifts to the accused. The existence of any general custom which the court intends to rely on must be proved by evidence. The circumstantial evidence in the instant case did not irresistibly point to the appellant to the exclusion of all others so as to justify conviction. The evidence used to convict the appellant did not satisfy the legal requirements of circumstantial evidence to warrant or justify the conviction of the appellant. Suspicion, however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt."

79. In this case the chain of events point in all human probability unerringly to the accused as the person who murdered the deceased and decapitated her head and cut other parts into separate pieces.

80. In this case the chain of events is so connected that the accused's defence that he escorted his wife to Ngarua bus stage in Nyahururu Town between 5.45 a.m. and 6.05 a.m. and that she disappeared thereafter is not credible. The deceased would certainly have had her cell-phone at about that time her sister (PW7) called her: - **"On 6th January, 2011 I called her at 6.00 a.m. and found her phone on "mteja" mode – engaged."**

81. If the accused escorted her at between 5.45 a.m. and 6.00 a.m. to Ngarua bus stage, would he not have been interested in whether his wife got transport before his returning home. The accused informed PW1, his neighbour that he had escorted his wife, if indeed he had escorted his wife, why would she not have had her cell-phone with her at 5.45 a.m. – 6.00 a.m.? As stated in **Section 9(35) of the Penal Code**, motive is irrelevant to the commission of a crime. In my considered opinion therefore, all the circumstantial evidence irresistibly points to the accused as the person who murdered his wife and decapitated her and dismembered parts of her body and feigned the evidence that he escorted her to some bus stage. The reasons are clear:-

- 1. It is not credible to say that he had good relations with the deceased his wife;**
- 2. He had refused to pay his daughter's fees. That was a considered decision which does not occur at the spur of the moment;**
- 3. The deceased had decided to return to her mother, her parental home;**
- 4. The accused's attempts at reconciliation with a visit to her matrimonial home had been a**

failure;

5. Put in a dilemma as to how to pay fees for her daughter the deceased had turned to her sister (PW7) and not the accused. The accused would not even assist in the eye treatment of his daughter at Nyeri Provincial Hospital;

6. The deceased went to her mother on 3rd January, 2011 and informed her that she would go to her matrimonial home and called her husband before she left on 5th January, 2011;

7. PW2 called the deceased on 5th January, 2011 at about 6.40 p.m. Her voice was low, but confirmed the deceased had reached her destination;

8. PW1 collected his jogoo at 7.00 p.m. or thereabouts and found the accused with the deceased.

9. PW4 also called at about the same time and the deceased informed her that she would call later but never did;

10. PW4 testified that the accused informed her that the deceased was not with her because she was used to walking away from him. This is contradiction to his stated evidence that he had escorted her to Ngarua Bus Stage in Nyahururu Town.

11. PW7 called at 6.00 a.m. on 6th January, 2011 and found her sister's phone on engaged (mteja) mode. The deceased did not sound like herself.

12. The accused was the last person with the deceased.

13. There was no evidence that the deceased was accosted by MUNGIKI or that there were attacks by MUNGIKI on the material night or morning.

14. The purported escort to Ngarua Bus Stage, and subsequent report to the police, and purported search was nothing more than a camouflage and smokescreen to deflect attention from himself.

82. In this case therefore, the inculpatory facts are incompatible with the innocence of the accused and are incapable of explanation upon any other reasonable hypothesis than the guilt of the accused. There is no existing circumstance weakening the circumstances of the accused's guilt. The circumstantial evidence in the instant case irresistibly point to the accused to the exclusion of any other person.

83. In the light of these very clear circumstances, it is no theory but hard circumstantial evidence, though the deceased gave evidence on oath, that he escorted his wife to Ngarua bus stage in Nyahururu at between 5.45 – 6.00 a.m., that evidence is entirely discredited by the prosecution evidence. It is my finding that the accused murdered the deceased the night of 5th January, 2011 and subsequently faked an early morning journey to a bus stage in Nyahururu Town.

84. For those reasons, I find him guilty of the offence of murder contrary to **Section 203** of the **Penal Code** and I convict him accordingly.

85. I call upon counsel to address the court on why the accused should not be sentenced to death in terms of **Section 204** of the **Penal Code**.

It is so ordered.

Dated and Signed at Mombasa this 6th day of February, 2015.

M. J. ANYARA EMUKULE

JUDGE

Read and Delivered at Nakuru this 19th day of February, 2015.

JANET MULWA

JUDGE OF THE HIGH COURT

In the presence of:

No appearance for the Accused

Ms. Ngori for the Prosecution

Mwai Court Clerk