



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CRIMINAL CASE NO. 109 OF 2012**

REPUBLIC.....PROSECUTOR

VERSUS

GEORGE KINYANJUI WACHUKA.....ACCUSED

**JUDGEMENT**

**Background**

George Kinyanjui Wachuka, the accused, is charged with murder contrary to section 203 read with section 204 of the Penal Code. The particulars of the charge are that on the 26<sup>th</sup> December 2012 at Githurai Kimbo in Kasarani District within Nairobi County murdered Stephen Heho. The accused was represented by Mr. Kang'ahi, advocate. Various prosecution counsels including Ms Ikol and Ms Magoma conducted the case for the Director of Public Prosecutions. Nine (9) prosecution witnesses testified for the prosecution while the defence called the accused as the only defence witness.

**The charge of murder**

Murder is an offence created by section 203 of the Penal Code. It is committed when any person with malice aforethought causes death of another person by an unlawful act or omission. The penalty for murder is death as provided under section 204 of the Penal Code. The prosecution bears the onus of proving murder and the standard of proof is beyond reasonable doubt. To prove murder against the accused before the court, the prosecution must prove that unlawful death of the deceased person occurred; that it was caused by the accused person before the court and the accused person possess malice aforethought when he caused that death. It is upon the court trying a charge of murder to analyze all the evidence tendered by the prosecution and the defence and determine if it proves all the ingredients of murder before it can make a decision whether the accused before the court is guilty of the offence of murder or not.

**The evidence**

Mary Wamaitha Mwaura, PW1, (Wamaitha) and Leah Wanjiku, PW2, (Leah) are sisters. On 25<sup>th</sup> December 2012 they, in company of their friend identified as Mary Wanjiru, went to Malek Pub in Progressive area situated at Githurai in Nairobi. They were taking 'chama' money to one Kamau at that Pub. They found Kamau not in and on contacting him on phone he advised them to give the money to one Margie at the counter of the Pub. Inside the said Pub was the accused George Kinyanjui Wachuka. He was Mary Wamaitha's former boyfriend. He accosted Wamaitha and alleged slapped her necessitating intervention by members of public. The two sisters and their friend Wanjiru left the Pub intending to attend a funeral meeting at the two sisters' uncle's place. The accused followed them.

They arrived at the meeting with the accused still following them. They found no people at the home and decided to leave. They were advised by their aunt to wait until the accused left before leaving. Their evidence is not clear as to whether they waited as advised. As they left, the accused followed them. They decided to ask one Dave whom they found at the gate to escort them. On reaching 'Corner Bata' as they called it, they met the deceased with another person not known to them. This was around 12.30am. Evidence shows that the deceased asked them what the matter was and he was told that the accused was following them. The deceased is said to have attacked the accused by hitting him. It is alleged that the accused stabbed the deceased. Evidence shows that everyone ran away after the stabbing.

Further evidence by the two sisters is that they went back to their aunt's place, according to Leah. Wamaitha said they went home. Whichever the case, they arrived home later. The accused is said to have followed them and knocked at the door. Evidence is again varies as to whether the door was opened for him or he broke it open. It is alleged that he attempted to stab Wamaitha but one Njeri an aunt or cousin to the two sisters called motor cycle riders to help. The accused left on seeing the riders. It is alleged that he dropped the knife he had been threatening Wamaitha with. The riders collected it. It was later handed over to the police.

The deceased was helped to the Sinai Hospital but later died as he was being transferred to another hospital. With the help of Wamaitha, police tracked the accused to his house and arrested him. He was taken to Kimbo Police Station together with Wamaitha and later transferred to Kasarani Police Station. Wamaitha was released while the accused was detained and later charged with this offence.

Mary Mugure, PW3, and Michael Ngugi, PW4, are the two relatives who identified the body of the deceased to the doctor for purposes of post mortem. Dr. Joseph Maundu, PW5, examined the accused on 4<sup>th</sup> January 2013 on request by the police. He found him mentally fit to stand trial. Lawrence Kinyua Muthuri, PW6, is the Government Analyst who examined the knife allegedly used to stab the deceased and blood samples from the accused and the deceased. His findings were that the knife was stained with the deceased's blood.

Sergeant Richard Matoke, PW7, was the arresting officer. He had been on mobile duty in Progressive area in company of other officers from Githurai Kimbo Police Station when they received the report of an injured person who had been taken to Mt. Sinai Hospital. They went to the place and found the injured person, who was identified as the deceased had been referred to a bigger hospital. The members of public who had been assisting the deceased informed PW7 that the deceased had died on the way to the other hospital (it was not named). The deceased's body had been left at a construction site. PW7 and his fellow officers were shown where the deceased had been left. The body was collected and taken to the City Mortuary. Further evidence by PW7 is that Wamaitha was handed over to him by members of public. PW7 enquired from her what had happened. Wamaitha told PW7 that the accused is the one who had stabbed the deceased. She led PW7 to accused's home. He was arrested.

Dr. Johansen Oduor, PW8, examined the body of the deceased on 2<sup>nd</sup> January 2013. He found multiple injuries: a stab wound on the left shoulder measuring 4cm by 6cm; a stab wound on the left neck measuring 3cm by 2cm; two stab wounds on the lower back right side measuring 4cm by 4cm; a slash wound on the left side of the head measuring 7cm long; one stab wound on right upper back 2cm by 2cm and stab wound on the upper back left side measuring 2cm by 2cm. He also found injury on the neck vessels on the left side and lacerations on both lungs. He formed the opinion that the deceased died due to multiple injuries due to stab wounds.

Corporal Ambrose Gichana, PW9, from CID Kasarani took over and concluded the investigations of the case. He recorded statements from witnesses; took over the exhibits and preferred the charges against the accused.

The accused testified on oath. He told the court that he met Wamaitha whom he said was his former girlfriend and her sister and friend at Marek Pub and bought Wamaitha a soda. That she informed him that her uncle had passed on and asked him to assist her with fundraising for the funeral. He said he gave her Kshs 1,000 which she refused to take saying it was not enough and they exchanged words over the

matter. He said he promised to give her Ksh 5,000 which calmed her down and they continued taking drinks until 10.30pm; that Wamaitha told the accused to escort her to the funeral and home afterwards; that they left but on finding few people at the funeral Wamaitha told the accused to escort her home. On the way they met three men at 'Corner Bata'. They were stopped by the three men whom he did not know. The three asked the accused what he wanted with the girls and he told them he was escorting them. One man started slapping him and the others joined. They were overwhelming him and he pushed one who fell down. He got a chance to escape and he went to his home and went to sleep. He said he was arrested around 3.00am after Wamaitha took police to his home. He said no knife or any other weapon was found in his house after police searched it.

### **Analysis and determination**

The death of the deceased has been confirmed by the doctor who performed the post mortem. It was unlawful death resulting from the stab wounds inflicted on him. My analysis of the evidence on record specifically that of Dr. Oduor, confirms and settles the issue of the death of the deceased.

This leads me to the next issue for determination: who inflicted the fatal stab wounds on the deceased? Does the prosecution evidence prove beyond reasonable doubt that the accused before the court stabbed the deceased inflicting multiple wounds from which he died? Defence counsel Ms Munguti holding brief for Mr. Kang'ahi thinks not. In her submissions after the close of the defence case she told the court that the prosecution evidence does not meet this legal threshold. She pointed out that there are major contradictions in the evidence of Wamaitha and Leah her sister; that there was no evidence to support the findings in the post mortem report that there were multiple stab wounds on the body of the deceased and the issue of the murder weapon. She submitted that the person who recovered the knife allegedly used to stab the deceased was not called to testify. On the other hand, the prosecution counsel submitted that the prosecution has proved the case to the required legal standard.

Wamaitha and Leah are the only witnesses who were present at the alleged scene. These two sisters gave different stories on the sequence of events. Wamaitha told the court as follows on the issue of stabbing:

**“We went to ‘Corner Bata’ and met a young man I do not know. He is Steve. We met him at ‘Corner Bata’. George was still following us. Steve asked George what he was after George told him to mind his own business. I moved aside. I found Steve down. I saw blood from the neck. He died. We ran away. That is Leah, Chiru and I plus Dave escaped. George also ran away.”**

On cross examination, Wamaitha stated that:

**“Steve asked George what he sought from me. George told Steve to mind his business. Steve slapped George first. I had moved aside when they started exchanging words. I was shocked to see Steve fall down. I saw him bleeding. We all scattered.”**

On her part Leah testified as follows:

**“Kinyanjui was following us when we met Heho. Heho asked us what was going on. We told him it was Kinyanjui and Heho hit Kinyanjui. Kinyanjui stabbed Heho. I did not witness the stabbing. At the time I was with Mary and Chiru and Kinyanjui was behind us. We met Heho and another man. We escaped after the stabbing.”**

On cross examination Leah stated that:

**“We were going home when we met Heho. He was in company of another. I remember we asked Dave to escort us. Heho asked us what was happening. Heho hit Kinyanjui first. He had asked Kinyanjui what was happening. Heho had no reason to attack Kinyanjui. The person with Heho was just standing there. We were also standing there. We ran away after Heho was stabbed. There was no light.”**

My reading and careful consideration of this evidence shows that none of the two sisters saw the stabbing. At the scene were the three girls, Dave who was escorting them and the accused who was following them. They met the deceased with another unidentified man. In total there were seven people at the scene. It was dark and Wamaitha says she moved aside when the accused and the deceased started exchanging words. Leah said the deceased was stabbed without stating that she saw this happening. Dave or the man who is said to have been with the deceased was not called to testify.

Secondly, the doctor who performed the post mortem on the body of the deceased found six stab wounds and one slash wound on the body of the deceased. There is no evidence on how these wounds were inflicted. Even if this court were to believe that the accused stabbed the deceased as testified, I find no evidence from the accounts of Wamaitha and Leah to show that they witnessed what happened and that the accused stabbed the deceased on several parts of his body. Such evidence is lacking. This leaves the manner in which those wounds were inflicted unsupported by evidence.

Thirdly, there is the issue of what happened after the alleged stabbing. Again the two sisters contradicted each other. Wamaitha said they escaped and went home. She said the accused followed them and knocked at her door. She said she refused to open and the accused broke the door and entered; that he told her to go with him but she refused; that she screamed and her aunt Njeri went to assist them; that her aunt Njeri told her to go with her to her house and the accused followed them and threatened her with a knife which she placed on her neck; that her aunt stopped motor cycle riders for help and that the accused escaped on seeing the riders. On cross examination Wamaitha contradicted herself by stating that it was her friend Chiru who called Njeri to come to assist them and not because Njeri was attracted by her (Wamaitha's) screaming.

On her part Leah said after the stabbing incident the three girls went back to the home of their aunt. She said they were escorted home by their cousin called Grace Njeri and her husband Mwangi. She said that on arrival the accused followed and Wamaitha opened the door for him. She denied on cross examination that the accused broke open the door.

This evidence seems to describe two totally different scenarios and makes me doubt whether the two sisters were describing the same events. One says the accused broke open the door, the other says not so; one says Njeri is their cousin, the other says she is their aunt, one says Njeri went to their house after hearing screams from Wamaitha, the other says Njeri and her friend Mwangi escorted them home!

Finally, there is the issue of the murder weapon. Wamaitha told the court that when the accused followed her with her cousin/aunt he threatened her with a knife which he placed on her neck. She said that when the motor cycle riders came the accused dropped the knife. The same knife was picked by riders and handed over to the police at Progressive. Wamaitha identified the knife in court. This evidence begs the question, was this knife the same one allegedly used on the deceased?

The only other time the issue of the knife features in evidence is in the testimony of CPL Richard Matoke, PW7. He told the court as follows:

**“We also were handed over a knife said to have been found beside the victim. Same members of public who had escorted deceased including Jackson Kariuki handed knife to us. They said they had found the knife near the deceased on the road. It was a kitchen knife. Handle was wooden. I am able to identify it. It is this one (referring to MFI-1 the knife identified by Wamaitha).”**

Clearly, there is confusion regarding the knife. Was it the one allegedly used to threaten Wamaitha and which was dropped by the accused and recovered and handed over to the police by motor cycle riders? Was it the one found next to the deceased at the scene where he was allegedly stabbed and which members of the public including Jackson Kariuki recovered and handed to the police? Need I say more? There is no clear evidence regarding the knife and this leaves doubts in my mind.

Evidence shows that the knife was taken to the Government Analyst and found to be moderately stained

with human blood. DNA profiles generated from the stains confirmed the DNA from the deceased. This confuses the matter even further.

My detailed analysis of all the evidence on the issue as to who stabbed the deceased leads me to conclude that the evidence by the prosecution witnesses, specifically by PW1, PW2 and PW7 leaves more questions than answers on this issue. This leaves serious doubts in my mind and I agree with defence counsel that the threshold of proving case beyond reasonable doubt was not met. When I consider that no witness saw the stabbing; the contradictions in evidence and the doubts surrounding the recovery of the alleged murder weapon I can only arrive at the conclusion that the prosecution has not discharged its mandate in proving this case beyond reasonable doubt. An accused person is not under any legal duty to prove his innocence. While the accused is placed at the scene of the stabbing, the contradicting evidence and lack of clear evidence pointing to him as the person who inflicted the multiple stab wounds on the deceased coupled with the unexplained multiple stab wounds on the body of the deceased leaves me with many doubts. The law is clear that where doubts exist in a criminal trial, they go to the benefit of the accused person. This case is no exception and the accused is going to benefit from the numerous doubts created by the unclear evidence.

On the issue as to whether the accused possessed malice aforethought, I find that this is a non-issue now given that he has not been identified as the person who stabbed the deceased.

In conclusion, I make a finding that the accused is not guilty of the murder of Stephen Heho. The reasons for this have been explained in detail in this judgement. Consequently, I acquit him forthwith. He is free to go home unless for any lawful reason he is held in custody. Orders are made accordingly.

**Dated, signed and delivered this 28<sup>th</sup> day of September 2015.**

**S. N. MUTUKU**

**JUDGE**

**In the presence of:**

Ms....., Prosecution Counsel

Mr./Ms....., Defence Counsel

Mr. George Kinyanjui Wachuka, Accused Person

Mr. Daniel Ngumbi, Court Clerk