



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CRIMINAL CASE NO. 66 OF 2012**

**LESIT, J.**

**REPUBLIC.....PROSECUTOR**

**-VERSUS -**

**GEORGE KAMAU WAMBUI.....ACCUSED**

**JUDGMENT**

1. The accused person, **GEORGE KAMAU WAMBUI** is charged with Murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the offence were:

**“On the night of 12<sup>th</sup> August 2012 at Ngecha village Kiambu County, murdered JOYCE MUTHONI MURIU.”**

2. The prosecution called a total of 11 witnesses. The facts of the prosecution case are that at 9 a.m. on the 13<sup>th</sup> August 2012 the Administration Police Officer, PW6 received a call from a member of public, not called as a witness. He was informed that a person had been seen pushing a wheel barrow with things suspected to have been stolen.

3. PW6 and his colleagues including PW1 proceeded to Ngecha Market to investigate when they spotted the accused pushing a wheel barrow. The wheel barrow P.Exh. 10 had empty sacks, some with blood stains, a jerry can and charcoal. The accused led them behind a shop where he identified a half sack of potatoes, 10 kgs beans and 3 jerry cans of 20 kgs each. A part from food stuffs and charcoal the rest of the items were identified in court as P. Exh. 1 to 9. Inside the sack of potatoes and beans were a brick plate, tool box, metal box and big sufuria – P. Exh. 5 to 8.

4. PW1 and 6 testified that upon arresting accused and seizing the exhibits for further investigations they took all to the AP Camp, Ngecha. At that point the two officers testified that they arrested the accused for having in his possession suspected stolen property. At the Camp, a closer scrutiny of the recovered items revealed blood stains on the jerry can and gunny bags. The accused was searched and of the 2 jackets he wore, P.Exh. 9 was found to have blood stains.

5. PW1 and 6 involved the Area Chief Kangethe, PW5 who circulated the report of recovered items suspected to be stolen and asked people to proceed to the camp to identify them. At 3 p.m. same day, PW7 a daughter of the deceased identified P.Exh. 1 to 8 as her mother’s properties.

6. A visit to PW7’s mother’s home revealed that the mother was dead. She was found lying on a sofa set with blood oozing from the mouth. She had a depressed left side of the head. The deceased house was

not disturbed but outside near the gate potatoes were seen scattered around.

7. PW11 the investigating officer, also visited the scene from Tigoni police station. He recovered a sufuria cover with blood stain, P.Exh.15 outside the kitchen in the deceased home. PW11 took over all the exhibits except the charcoal, beans and potatoes. He later submitted them together with the blood sample from the deceased to the Government Analyst.

8. A post mortem on the body of the deceased by Dr. Ndegwa PW10 revealed that the body of the deceased had a laceration behind the left ear, and internally a depressed fracture of left temporal skull with intracranial hemorrhage and signs of increased intracranial pressure. The cause of death was head injury due to blunt force trauma.

9. PW4 was the Government Chemist who received blood samples from the accused and deceased, bundle of white sacks P.Exh.3 and 4, plastic jerry cans of 20 liters. P.exh. 1 and 2, creamish jacket, P.exh. 9 and sufuria P.exh. 15. After DNA profiling of the blood samples and blood stains they received, PW4 concluded that the DNA profiling generated from blood stains from the jerry cans P.exh.1 and bundle of sacks P.exh.3 and 4 all matched the DNA profile generated from the blood of the deceased. The jacket had blood of DNA profiling resembling that of DNA profiling from accused blood. His report was P.exh. 11.

10. The accused was placed on his defence. He gave a sworn defence. The accused stated that he had 3 children, was aged 50 years and was a widower. Accused defence was that as far as he knew, the deceased was still alive. He stated that he used to work for the deceased on casual labour basis whenever she required him.

11. The accused stated that he went to Ngecha shops on 8<sup>th</sup> August 2012, and that after eating at Chungwa Hotel, he sat outside the hotel on a form. The accused stated that the deceased called him to where she was. He stated that she requested him to deliver a sack of charcoal to a customer. He also told her he required to borrow her wheel barrow for 3 days. He then delivered the charcoal as requested and returned the wheel barrow to her.

12. The accused stated that he secured a casual labour job from one Njoroge on the same day and that he did that work between 11<sup>th</sup> and 12<sup>th</sup> August 2012. He said that at 4 p.m. on 11<sup>th</sup> as he was working on a ladder, it broke causing him to fall and injure his eye. The accused stated that he wiped his eye with the jacket he was wearing. He said that he finished work at 6 p.m. on 12<sup>th</sup> August then proceeded to Ngecha shopping centre with the wheelbarrow.

13. The accused stated that he left the wheel barrow and tools at Web Bar as it was late. That on 13<sup>th</sup> he collected the wheel barrow and proceeded to the hotel at Ngecha where APC Rono, PW6 called him. PW6 asked him if the wheelbarrow was his and he said yes. He was then told to push it to the AP Camp where he was locked up. He said the police saw blood on the collar of the shirt and his clothes were taken away. He was later charged with this offence.

14. I have carefully considered the entire evidence adduced by the prosecution and the defence and submissions made by both sides.

15. The burden to prove a charge of murder against an accused person lies with the prosecution to prove beyond any reasonable doubt that the accused person attacked and inflicted injuries on the deceased resulting in his death. They must prove that the accused formed the necessary *mens rea* to commit the offence that is that at the time the accused inflicted the injuries on the deceased he had formed an intention to either cause death or grievous harm to the deceased. They must also prove that the accused possessed malice and aforethought as defined under **section 206** of the **Penal Code**. The said provision reads:

**“206. Malice aforethought 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;**

**4. 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.”**

16. The case against the accused was that he was found in possession of certain house hold and farm items belonging to the deceased, on the same day that her body was discovered dead in her house. Some of those items had blood which on analysis by a Government Analyst were found to belong to the deceased.

17. There was disparity in the evidence of the prosecution. The accused was arrested by Admin. Police Officers who included PW1 and 6. PW1 testified that they found the accused pushing a wheel barrow, P. exh. 10, and on top of it, they saw charcoal, jerry can P. exh. 1, empty sacks P. exh. 3 and 4. PW1 testified that the accused pointed to other items 5 meters away which were behind a shop. These items were half a sack of potatoes, 10 kgs. of beans, 3 jerry cans P. exh. 2. Inside the sack of beans was a big sufuria P.exh. 8, tool box Pexh 5, meter box P. exh. 7and brick plate P. exh. 6.

18. PW6 in his evidence testified that the accused was pushing the wheel barrow P. exh. 10, P. exhs. 1, 3, 4, 5 and 7, and other items that were not produced as exhibits, a jembe, and charcoal. PW6 did not of talk of any items having been collected from behind shops as PW1 stated.

19. PW1 and 6 are in agreement that the accused had in his possession the sacks P. exhs. 3 and 4, the jerry can P. exh 1 charcoal and the wheelbarrow. Among these items, P. exhs. 1 the jerry can, P. exh. 4 the sacks found with accused, and a sufuria lid recovered from deceased home by the investigating officer all had blood whose DNA profiling resembled that of the deceased. Even though there was no eye witness accounts of how the deceased met her death, there was circumstantial evidence that the accused was ferrying items which had deceased blood stains. It was within the accused knowledge how that blood came to be on the things he was carrying, and which he claimed categorically that they were his. It was therefore in the accused interest to explain where the blood came from.

20. **Section 111(1) of the Evidence Act** creates a rebuttable presumption. In this case that rebuttable presumption is to the effect that since the accused had with him property which had deceased blood, he should explain how that blood happened to be on the said items. The section provides as follows:

**111.(1) When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him:**

**Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution, whether in cross-examination or otherwise, that such circumstances or facts exist:**

**Provided further that the person accused shall be entitled to be acquitted of the offence**

**with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defence creates a reasonable doubt as to the guilt of the accused person in respect of that offence.”**

21. The accused did not explain how the deceased blood came to be found on the properties he was carrying. In his defence however, he said that he borrowed the wheel barrow from the deceased on 11<sup>th</sup> at 7am, one day before the date in question. The accused said he had borrowed the wheel barrow for three days.

22. The explanation by the accused does not explain how the deceased blood came to be on the items he was found with. Furthermore, the accused was arrested on the 12<sup>th</sup> within Ngecha shopping centre which rebuts the accused defence that he was working for a Mr. Njoroge from 7am each morning, between 11<sup>th</sup> to the 12<sup>th</sup> August, 2012. At 9am on the 12<sup>th</sup> August, 2012, he was arrested at Ngecha shopping center and thereafter charged with this offence.

23. Court of Appeal in the case of **Ernest Abanga Alias Onyango Vs Republic C.A. No. 32 OF 1990**, observed:

**“In RAFAERI MUNYA alias RAFAERI KIBUKA V REGINAM (1953) 20 EACA 226, the appellant there was convicted of murder and the case against him was mainly based on circumstantial evidence. In his sworn evidence at the trial, he made some denials which were obviously false. It was held that:**

The force of suspicious circumstances is augmented where the person accused attempts no explanation of facts which he may reasonably be expected to be able and interested to explain; false, incredible or contradictory statements given by way of explanation, if disapproved or disbelieved become of substantive inculpatory effect”.

**This case in our view, does not in any way go against the basic legal principle that the burden of proving a criminal charge beyond doubt is solely and squarely upon the prosecution. But its basic holding, namely that when an accused person tells an obvious and deliberate lie which is disproved or disbelieved, then such a lie is capable of providing corroboration to other independent available evidence”.**

24. I am guided by this authority. Where the person accused attempts no explanation of facts which he may reasonably be expected to be able and interested to explain, that has the effect of augmenting the force of the suspicious circumstances adduced against him and can serve as corroboration to other independent available evidence.

25. In the normal cause of things, blood can only be found on things that were close to the source or point of bleeding. In this case, the items the accused was ferrying and on which the deceased blood was found were the jerry can and the sacks or gunny bags, P. exhs. 1 and 4. The only way these items could have gotten the deceased blood is if they came into contact with the deceased when she was bleeding. Furthermore, the deceased had a depressed left side of the head and from the photographs of the body taken by the police shows visible blood clots on the cheek and the ear of the deceased. The only explanation then is that the items in issue got the blood from the deceased because they came into contact with her at the time she was bleeding.

26. We have other evidence which is the fact that PW7, the daughter of the deceased was able to identify the gunny bags or sacks P. exhs. 3 and 4, together with the wheel barrow, P. exh. 10, which accused was found pushing, together with the big sufuria P.exh. 8, tool box P.exh 5, meter box P. exh. 7 and brick plate P. exh. 6, as property belonging to the deceased. For P. exhs. 5, 6, 7 and 8 the evidence of whether accused had them on the wheel barrow, as per PW6 evidence, or outside the shop, as per PW1, was controversial. Even then, the accused did not deny he had the things in question within his control, and neither does he deny that he claimed all of them as his property, except the wheel barrow.

27. I find that the accused had in his possession properties belonging to the deceased on the same day that the deceased met her death. Further, some of the properties had the deceased blood on them, and the only explanation for the presence of blood on these items is that they came into contact with the deceased at the time she was bleeding after the vicious attack which led to her death.

28. While considering how to test circumstantial evidence, the court of appeal in the case of **Rep V. Kipkering Arap Koskei & Another 16 EACA 135**, 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.”**

29. I am well guided. From the circumstantial evidence in this case, I find that the accused not only had knowledge of how the deceased met her death, but was the one who caused the accused death. I have also considered the accused defence and scrutinized the case to see whether there are any co-existing circumstances which may weaken the prosecution evidence against the accused. I find none.

30. I find that the inculpatory facts adduced in this case are incapable of any other explanation upon any other hypothesis except that of the accused guilt. I find that these facts point irresistibly to the accused as the one who inflicted the fatal injuries upon the deceased as a result of which she died.

31. Before I end I must comment on one more issue. The Assistant Chief PW5 treated the matter rather casually, when PW1 and 6 asked him to help them find out the owner of the properties found in accused possession. That was a mistake especially after blood was found in some of the items. Instead of using police officers who were at his disposal in his official capacity, he sent members of the public to carry out investigations for him. There was also one Paul who called PW6 and reported the accused as ferrying things suspected to be stolen. He too should have been called as a witness.

32. Having found error in handling of the case by PW5, and failure to call Paul as a witness, I never the less find that the said error and omission are not fatal to the prosecution case. They do not affect the circumstantial evidence against the accused. The substance of the prosecution case against the accused is not affected.

**33. I have carefully considered the entire evidence adduced by both sides, and have cautioned myself of the special need of care and scrutiny in receiving and relying on circumstantial evidence. Having done so, I find that the prosecution has proved its case against the accused person beyond any reasonable doubt. Accordingly, I reject accused defence, find him guilty of murder contrary to section 203 of the Penal Code, under section 322 of the Criminal Procedure Code, and convict him accordingly.**

**DATED AT NAIROBI THIS 29<sup>TH</sup> DAY OF OCTOBER, 2015.**

**LESIIT, J.**

**JUDGE.**