



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CRIMINAL CASE NO. 54 OF 2014**

REPUBLIC.....PROSECUTOR

VERSUS

WILLIAM MBITHI NGALI.....ACCUSED

**JUDGEMENT**

William Mbithi Ngali, the accused before the court, is charged with murder of Simon Kariuki Njoroge contrary to section 203 as read with section 204 of the Penal Code. The offence is said to have been committed on 1<sup>st</sup> April 2014 at Donholm Estate within Buruburu in Nairobi County.

The brief facts of the case are that on 1<sup>st</sup> April 2014 a group of young men including Anthony Kamau Kinyanjui (PW1), Isaiah Maingi Kirugu (PW2) and the deceased were offloading sand at Donholm when the accused who was nearby, is said to have made a telephone call to some people calling them to join him. He is said to have gone away briefly and returned with a group of people said to be 8 in number according to PW1 or 4 in number according to PW2. An argument ensued between him and the deceased. The accused is said to have stabbed the deceased on the stomach with a knife which he threw in the compound of Micksy Kindergarten School nearby and escaped. The deceased was taken to Mama Lucy Hospital for treatment and later to Kenyatta National Hospital where he was admitted. He died on 22<sup>nd</sup> June 2014 while undergoing treatment. The accused was initially arrested and charged at Makadara Law Courts with assault. Following the death of the deceased the accused was charged with murder.

Murder is committed when a person with malice aforethought causes the death of another by unlawful act or omission. To prove murder the prosecution must prove beyond reasonable doubt that the death of the deceased occurred due to an unlawful act or omission by the accused who is charged before the court and that the accused intended to cause that death.

It is the duty of this court to consider and analyze all the evidence tendered before it in order to determine whether it supports a charge of murder. I have considered all the evidence including the defence of the accused. I find that there is no dispute that the deceased died while undergoing treatment. The cause of that death is disputed by the defence. In her submissions after the closure of the prosecution case and after the closure of the defence case, counsel for the accused Mrs. Ngulenywa submitted that the cause of death was not determined and that the cause of death is not related to the knife alleged used to stab the deceased.

On the issue of the death of the deceased and what caused it, I have carefully considered the evidence of Dr. Andrew Kanyi Gachie, PW7. Dr. Gachie testified on behalf of Dr. Midia who was not available to give evidence as he was away on study leave until February 2016. PW7 told the court that he knows Dr. Midia as a colleague he supervises. He said Dr. Midia performed the post mortem with Dr. Midiga who

trains doctors in pathology. He said that the post mortem was done on 30<sup>th</sup> June 2014 and that the deceased had been hospitalized with a history of assault that occurred on 1<sup>st</sup> April 2014 and that death had occurred on 22<sup>nd</sup> June 2014.

The deceased was found to be severely emaciated and the doctor said that:

**“He had multiple surgical wounds on the abdomen and one in the middle of the abdomen. He had a circular wound on left abdomen. It is indicated as left iliac region 3x2cm. There was a stab wound on the left upper part of the abdomen 6cm. Doctor noted pressure sores (bed sores) on the right buttocks. The doctor noted on internal examination there was accumulation of pus within the lungs. This is a sign of infection. There was infection within the abdomen. Other systems were normal. He formed the opinion that cause of death was septic shock secondary to multiple body abscesses due to the injuries he had sustained.”**

On cross examination, the doctor stated that:

**“There is a surgical wound. He had undergone surgery. There is also a circular wound on the left abdomen. There is a stab wound and pressure sores in the buttocks. The circular wound is not specified as to what caused it. The body was severely emaciated. He had lost a lot of weight. It is difficult to tell what had caused this emaciation but it shows that he had been very sick. He may not have fed well. I cannot say categorically what caused it. Pus in the lungs means he had an infection. He had generalized infection in the abdomen and pelvic region. The operation was carried out because of the injury. The doctor was repairing the injury. The large and small intestines were exposed. Doctors may leave bowls exposed to facilitate healing. The sutures may also have come off. I cannot explain why.”**

I have quoted the evidence of the doctor in detail because the defence is disputing the cause of death. The defence holds the view that the cause of death was not determined. My reading of the post mortem report and the evidence of the doctor as shown above leads me to hold a different view than the one held by the defence. In my understanding of this evidence, the doctor said he could not explain what had caused emaciation of the deceased but he explained that the deceased had been very sick and may not have fed well. This is his opinion on the matter.

My reading and understanding of the evidence of the doctor is that the doctors operated on the deceased in the process of treating him. Before this treatment was administered the deceased had a stab wound which the doctors were attempting to repair by way of surgery. In the opinion of the doctor the deceased died as a result of septic shock which was secondary to multiple body infections (abscesses). The doctor in his evidence explained that these multiple infections were as a result of the injuries the deceased had suffered.

Anthony Kamau (PW1) who saw the deceased on 1<sup>st</sup> April 2014 told the court that he saw the stab wound on deceased's stomach. The deceased's father Wilson Njoroge Mburu told the court that the deceased had a stab wound on the left side of the abdomen. This was confirmed by the post mortem report that shows that there was a stab wound on the left upper abdomen.

With this evidence, I have no doubt in my mind that the deceased sustained a stab wound on the left upper abdomen that led to multiple infections as a result of which he died. The cause of death in my view has been determined.

The next issue to determine is whether the accused inflicted those injuries using the knife exhibited in court or using any other weapon. If so, then the issue will arise as to whether he had formed the intention to cause the death of the deceased.

Anthony Kamau Kinyanjui (PW1) told the court that he saw accused calling some people to join him at the place where PW1 and his friends were offloading sand; that the accused went away and came back

with other 8 people and that PW1 left immediately these people came to the scene. He said that when he returned he was informed by Isaiah (PW2) and Edwin (not a witness) that the deceased had been stabbed by the **“person who had been calling.”** He told the court on cross-examination that he used to see accused at Donholm but did not know his name. He said that PW2 did not tell him the name of the accused.

Isaiah Maingi Kirugu (PW2) told the court that the accused is known to him and that he (accused) used to offload sand. He said the accused went to the place the group with PW2 was offloading sand alone at first, made a telephone call and left; that he came later with 4 people and started arguing with the deceased over work. PW2 said that the accused and the deceased fought and efforts to separate them failed; that the accused removed a knife and stabbed the deceased. PW2 identified the knife (Ex. 1) in court, a knife with a steel blade and steel handle with a bend blade, as the one the accused used. PW2 said that the accused threw the knife over a school compound. He said they chased the accused but he escaped.

This evidence, on the face of it, seems to connect the accused with the stabbing. However, doubts of this became apparent during cross examination. This is what PW2 told the court on cross-examination:

**“All the time they (accused and deceased) were fighting I was present. They fought using their hands but not seriously. The knife was found in the school compound. Accused escaped in Donholm. He disappeared. We were not close to them. We were some distance from them. I did not see where the knife was pulled from. Deceased came and told us he had been stabbed. This is when we knew he had been stabbed. Had he not told us he had been stabbed we would not have known. I do not know how the knife was recovered.”**

Although in re-examination PW2 insisted he saw the accused stab the deceased, his evidence in cross-examination casts some doubts in his evidence as an eye witness to what happened.

The evidence of PW2 is very crucial to this case because there is no other evidence implicating the accused. PW1 was not present when the incident happened. He was told by PW2. Veronica Ngina Wambua (PW9) who said she saw the stabbing and the suspect throw the knife in the compound of Micksy School before running away did not say who the suspect was.

Police Constable Kimutai (PW6) also mentions the accused. He testified that on 1<sup>st</sup> April 2014 while he was at Savannah Police Post he received the deceased who came to the Post bleeding and reported a case of stabbing by a co-worker. The deceased was referred to hospital. On the same day the accused went to the Post running being pursued by members of public on allegations of having stabbed the deceased. PW6 said that the police established from members of public that the accused had stabbed the deceased. He said that the accused was released on cash bail of Kshs 5,000. The deceased failed to report to the police after treatment and was later traced at Kenyatta National Hospital where he had been admitted. The accused was charged with assault causing grievous harm and was released on bail. PW6 said that after the deceased died, the accused was re-arrested and charged with murder. PW6 told the court further that he was able to know it is the accused who had stabbed the deceased because there were eye witnesses who saw the stabbing. He also said that the members of public brought a knife to him (Ex. 1). On cross-examination PW6 said the knife was handed to him by PW9.

The evidence of PW6 contradicts that of PW8 Alex Mumo, caretaker of Micksy Kindergarten, who testified that he took the knife to Savannah Police Post. Mumo told the court that on 1<sup>st</sup> April 2014 he found two school children with a knife; that he took the knife for safekeeping; that he found out from PW9 who operated a saloon nearby that the knife had been used to stab someone and that it should be handed to the police. Mumo said he kept the knife on the roof of the school until a police officer from Savannah Post came and enquired about it. Mumo said the knife had blood stains but the knife was found to have no blood by the Government Analyst. The report was produced in court by PW6.

What stands out in the evidence of PW6 is that the members of public who allegedly chased the accused to Savannah Police Post were not identified nor did they testify. The record of the court shows no evidence of a witness who was among the people who chased accused to the Post. It is only PW2 who

said they chased accused but he escaped. I quoted the evidence of PW2 in detail above to show the contradictions that he says they tried to separate the accused and the deceased as they fought and again said he was far and could not see what happened and that had the deceased not shown them the stab wound they would not have known he had been stabbed. This evidence creates doubts in my mind that if they were far and could not see what had happened until the deceased showed them the wound, how could PW2 and his co-workers have chased the accused until he escaped from them let alone chasing him to the Post?

I have considered the evidence by the accused. He does not deny that he went to the Police Post. He however puts the date as 14<sup>th</sup> April 2014 and said that he went there after PW6 called him on phone and he thought they were calling him to perform some plumbing work as he used to do some work for the police. He said that he was informed that he had beaten someone but was not shown the victim; that he was released on cash bail but was later re-arrested and charged with assault and taken to Makadara Court where he denied the charge and was released on bail; that he was later re-arrested and charged with murder after it was alleged that the victim of the assault had died. He said on cross-examination that he used to wait for casual plumbing work at Donholm. He claimed he was charged because PW6 was interested in his girlfriend. He said he did not know the deceased and had not stabbed him.

I have given all the evidence a lot of thought. The law is clear that he who alleges a fact must prove it. The burden of proof in criminal cases lies with the prosecutor who must prove all facts in support of the prosecution case beyond reasonable doubt. I am alive to **Section 143** of the **Evidence Act**, Chapter 80 Laws of Kenya provides that:

**“No particular number of witnesses shall in the absence of any provision of the law to the contrary be required for proof of any fact”**

However, the only witness who claims to have been an eye witness has contradicted himself during cross-examination to an extent that this court finds it is unable to believe his evidence. I also find contradictions in the evidence of PW6 in the manner the accused was arrested and the failure on his part to summon the members of public who are alleged to have chased the accused to the Police Post and told PW6 that the accused had stabbed the deceased. PW6 further told the court that the deceased was able to talk when they visited him in prison and the police took his statement. The contents of that statement were not disclosed. The court was not informed as to whether the accused named the assailant. Further, there is evidence from the government analyst that the knife Ex.1 did not have bloodstains although PW8 Mumo said when he recovered it, it had bloodstains.

My conclusion after reviewing and considering all the evidence is that the prosecution case is weak as shown in this judgement. A case should not be based on shaky evidence. All the evidence must be water tight to enable the court to form an opinion on who committed the offence. I have discredited the evidence of PW2 and PW6. These are the only witnesses who had some evidence touching on the identity of the accused as the person who stabbed the deceased. The doubts in this case will go to the benefit of the accused. The family of the deceased did not get justice. This court is not able to accord them justice with this kind of evidence due to the poor investigations. With a heavy heart, I find that I have no option in the matter than to acquit the accused because of lack of proof beyond reasonable doubt as required by the law. Consequently, William Mbithi Ngali is acquitted of the murder of Simon Kariuki Njoroge. He shall be released from custody and set at liberty forthwith unless for any other lawful cause he is held in custody. Orders shall issue accordingly.

**Dated, signed and delivered this 7<sup>th</sup> December 2015.**

**S. N. MUTUKU**

**JUDGE**

**In the presence of:**

Ms Macharia for the prosecution

Mrs. Gulenywa for the accused

Mr. William Mbithi Ngali, the accused

Mr. Daniel Ngumbi, court clerk