



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NYERI**

**CRIMINAL CASE NO. 39 OF 2009**

REPUBLIC.....PROSECUTION

**VERSUS**

E N M.....ACCUSED

**JUDGMENT**

**E N M**, the accused herein, is before this court to face a charge of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**. The particulars of the offence are that on 21st October 2007 at **[particulars withheld]** Village, Gikira sub-location in Murang'a North District within Central Province it is alleged that he murdered **R N M**.

The Prosecution summoned the evidence of eleven(11) witnesses who testified in support of its case. R W (P.W.1), stated that on 21/10/2007 at about 9.00pm two of her grand children namely; G W (PW3) and V N, arrived and told her that they had been escorted by Baba Maina (accused). On 22/10/2007, P.W.1, said she visited the residence of her daughter (deceased) who was the mother of the two children i.e. G and V but found it locked with a padlock from outside. She went back after a week she went back but this time round she found the door locked with two padlocks. P.W.1 made inquiries from the neighbourhood and was told that the deceased had not been seen for a while. P.W.1 visited the deceased residential premises for the third time and found the same still locked. She was prompted to report to Monica Wairimu (P.W.7), the area Assistant Chief who in turn advised P.W.1 to report to the police. S M (P.W.2), the deceased's landlady stated that on 20th November 2007 she requested P.W.1 to accompany her to the premises she rented to the deceased to break the door because a foul smell was emitting from that house and that is when they discovered the deceased's decomposing body lying under the bed. G W N (P.W.3) the deceased's daughter stated that she left for school in the morning of 21/10/2007 leaving her mother (deceased) still in bed with baba Maina (accused). P.W.3 said she came back at 3.00pm and found her brother, N alone. At 9.00 p.m, P.W.3, said, Baba Maina (accused) arrived, locked the house and took them to their grandmother's house. On the way, P.W.3 said, the accused handed them over to another man who took them to their grandmother's home and told to go therein. P.C.Peter Koech (P.W.5) said he visited the deceased's residence on 20/11/2007 on the instructions of his Superior, the O.C.S where he found the deceased's decomposing body under her bed. **P.W.5** stated that he did a search and found a jacket and a photograph belonging to the accused which he produced as exhibits in evidence. **I.P James Mburu (P.W.9)** said he arrested the accused for being drunk and disorderly but was found to be connected to the deceased's death.

When placed on his defence, the accused testified and also summoned two independent witnesses to buttress his defence. The accused (D.W.1) confirmed that the deceased was someone well known to him having seen her severally in Kangema town. D.W.1 denied having a relationship with the deceased. He denied being the father of P.W.3. N W (D.W.2) stated that she was married to the accused (D.W.1) and that she did not know that D.W.1 was married to the deceased nor that he had a relationship with the

deceased. D.W.1 stated that the police arrested him and took away from him his jacket and the photograph which were produced by P.W.5 as exhibits in evidence. G M N (D.W.3) stated that the accused being his father, used to come home every evening after the day's work as a matatu driver. D.W.3 denied knowledge of the relationship between the accused and the deceased. He said if his father had such a relationship he would have disclosed the same to him.

At the close of the evidence, Mr. Mwangi, learned defence counsel and Mr. Cheboi the prosecution counsel each filed written submissions. It is the submission of Mr. Cheboi, that the prosecution has established its case beyond reasonable doubt and that the defence set up by the accused did not displace the prosecution's case. Mr. Mwangi, learned advocate for the accused urged this court to find that the prosecution had failed to prove the case against the accused beyond reasonable doubt.

In order for the offence of murder to be established two ingredients must be proved to exist vizly:

- i. **Actus reus.**
- ii. **Mens rea.**

There is no doubt that the deceased did not die out of natural causes. The postmortem report prepared by Dr. Njoroge shows that the pathologist formed the opinion that the deceased died as a result of Asphyxia due to strangulation. The first ingredient of the occurrence of death is therefore established. The question is whether there was sufficient evidence to link the accused with that act. The only evidence that was tendered to link the accused with the offence is that of P.W.3 and P.W.5. According to P.W.3, the accused spent the night of 20th October 2007 with the deceased and that P.W.3 left for school, in the morning of 21/10/2007 after her mother (deceased) prepared breakfast for her. When she came back from school P.W.3 said she found her little brother N, alone outside their home. The house was locked from outside. Her mother (deceased) was not at home. At 9.00pm, P.W.3 said, the accused arrived and took them to the home of their grandmother (P.W.1). On the way, the accused handed them over to a stranger who took them brother to the hedge of their grandmother's fence. P.W.3 said, that the accused, fondly referred to as Baba Maina, spent every night at their home and that her biological father used not to visit them. I am convinced that P.W.3 knew the accused very well and that she told the truth when she said that the accused spent the night on the material date with the deceased. Though DW2 and DW3 stated that they did not know the relationship between the accused and the deceased, I do not expect them to be told by the accused of his illicit affair. P.W.2 confirmed that she knew that the accused cohabited with the deceased and that he had interacted with him prior to the date of the incident. P.C.Koech (P.W.5) visited the deceased's residence on 20/11/2007 and therein he found a jacket which had the deceased's photograph. The accused has attempted to explain that the jacket and photograph were taken from him by the police when he was arrested. I do not believe the accused's line of defence. There was no reason to make the police plant such evidence against the accused. I find the evidence of P.W.3 as corroborated by the evidence of P.W.5 to be credible. The circumstantial evidence when pieced together show that it is the accused who committed the act of killing the deceased and no one else. I find that the ingredient of **actus reus** was proved.

The other ingredient which must be proved is the element of **malice aforethought**. There is no direct evidence to prove this element against the accused. Under **Section 206** of the **Penal Code** malice aforethought is deemed to be proved in the following circumstances *inter alia*:

- 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. an intention by the act or omission facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.**

I have already stated that the deceased is said to have died as a result of strangulation. Whoever strangled her, must have intended to cause grievous harm or death to the deceased. I again, find that the ingredient of malice aforethought was established.

In the end, I find **E N M**, the accused, guilty of murder. He is consequently convicted for the offence. Before sentencing, I call upon the learned State counsel to state the accused's past criminal record and the defence counsel to submit the accused's facts in Mitigation.

**Dated and Signed this 20<sup>th</sup> day of February ,2014.**

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**J.K.SERGON**

**JUDGE**

**Delivered in open court this 20<sup>th</sup> day of February 2014 by Hon J. Wakiaga**

**In the presence of:**

..... for Director of Public Prosecutions

..... for Accused