



**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CRIMINAL CASE NO. 12 OF 2010**

**REPUBLIC .....PROSECUTOR**

**VERSUS**

**PAUL MUNGAI NTHIGE ..... ACCUSED**

**JUDGMENT**

Paul Mungai Nthige is charged with the offence of murder contrary to Section 203 as read with Section 204 of the penal code. The particulars of the offence are that on 1/1/2010 at Nderi Forest, in Kiambu District, he murdered Leah Wangare Ngaruiya. He denied the offence. The case proceeded to full hearing with the prosecution calling a total of 12 witnesses. The accused gave his evidence on oath and called one witness.

The deceased Leah Wangare had been married to the accused for 7 years but they had separated at the time she met her death. **PW1** Lucy Waweru Ngaruiya, a sister to the deceased, told the court that on 31/12/09, the deceased left home saying she was going to look for a police abstract at AP camp and Haraka Police Station. She returned late that day. **PW1** went on church 1/1/2010 and left the deceased at home. Upon returning home, she found the deceased leaving saying she had been called on phone but did not disclose who called her. She never saw the deceased again till her body was found in City Mortuary on 12/1/2010.

**PW2** Mercy Wangari who is married to the deceased's brother told the court that on 27/12/2010, she met the deceased who informed her she was going to Haraka trading centre for some documents but later, **PW2** spotted her at Fly Over with accused. When **PW2** asked the deceased why she lied to her, the deceased swore her to silence.

**PW3** Ruth Njoki Nganga, the deceased's sister said that on 1/1/2010, the deceased was supposed to go and meet the accused at Haraka Trading centre where he was supposed to open for her a business. **PW3** did not see the deceased leave the house because she was asleep. The deceased disappeared till her body was recovered in Kikuyu area. She also told the court that the accused and deceased had 3 children and the deceased had gone to FIDA to seek assistance for maintenance of the children and the accused started paying maintenance which the deceased used to collect from Naivasha Court. She said that she knew the accused had married Grace Wanjiku, who started sending the deceased threatening messages that the deceased would know that she is from Kabete.

Anthony Nganga, PW4, is a brother to the deceased who identified the deceased's body to the doctor

before post mortem was done.

**PW5** Jane Nungari Murage mother to Grace Wanjiku accused's current wife was declared a hostile witness and the evidence will not be considered in this judgment. It is worthless.

**PW6** Dr. Njau Mungai performed the post mortem on the deceased on 13/1/2010. He found the deceased's body to have multiple stab injuries on the upper body, face, right neck, penetrating carotid artery, left lower chest penetrating the diaphragm, lungs and liver. He formed the opinion that the cause of death was severe blood loss. He produced both the post mortem report and the P3 which was filled after the accused was examined and certified to be fit to the stand trial.

PC Pius Kamande (PW7) who was based at Kikuyu Police Station recalled that on 2/1/2010, he was instructed by OCS Kikuyu to accompany other police officers to Nderi Forest where they found the body of a woman, who had multiple stab wounds. Next to the body, they found a knife with initials of J.N.M. on the handle. It was 5 metres away from the body. The scenes of crime took photographs of the scene. **PW7** was present during post mortem. He later handed the knife over to OCS Haraka Police Station.

Paul Waweru, a Government Analyst (**PW8**) testified that on 28/1/2010, he received from PC Pius Njagi, A-blood sample of the deceased; B- Blood sample of the accused; a kitchen knife and a blue striped shirt for purposes of examination and determining whether the blood samples on the items matched with the blood. He produced his report in which he formed an opinion that the blood on the knife and shirt matched the deceased's blood group, which was Group B. (Exh 3a & b).

Peter Mwangi Ngaruiya (**PW9**) is the deceased's brother who confirmed that the deceased and accused had separated after disagreements; That in the first one year of separation, they were not in contact but the deceased approached the children's department to assist her get maintenance for the children and a case was filed at Nyahururu Court CC 43/09, which was seeking payment of Kshs.21,500/= annually. Earlier the Children's Officer Naivasha had directed accused to pay maintenance to the deceased. After the case was filed, accused only paid Kshs.6,000/= school fees for 2009.

The investigating officer in this case (PW10) Cpl Pius Njagi of Haraka Police Station said he received a report of a missing person on 4/1/2010 from Joseph Ngaruiya. On 14/1/2010 the deceased's brothers reported to him that the body of the deceased was at City Mortuary having been recovered by Kikuyu Police Station. On the same day, he visited the house where accused and Grace Wanjiku lived and arrested her for interrogation. The accused was absent. On 18/1/2010, he went to Kikuyu police station with the OCS where a blood stained knife with initials J.N.M. was handed to him. On 20/1/2010 he arrested the accused for interrogation, and asked for the clothes the accused wore on 1/1/2010. PW10 went to accused's house at Kinamba and recovered a shirt that had blood stains on the pockets. Later, he forwarded to Government chemist accused's blood, that of deceased, the shirt recovered from accused and the blood stained knife for further investigations. PW10 also submitted the deceased's cell phone No. 0711720338 to Safaricom for further investigations as to whom she last called on 1/1/2010.

**PW12** Mutuma Sarguta a law enforcement liaison officer from Safaricom, upon the request by the OCS, Haraka Police Station he generated call data and serial number of the handset and serial numbers of the handset in respect of No. 0711720338 on 20/1/2010, for the period 31.12.2009 to 1/1/2010. The data disclosed that the deceased's no called accused's no. 0711266782 up to 1/1/2010 1541pm (3.41pm). He produced the certificate and data {Exh 4(a) & (b)} PW12 was unable to avail the geographical data of the phone in question because the police did not request for it. The investigating officer (**PW10**) also established from investigations that there was Nyahururu Maintenance Cause 43/09 in which the accused was asked to pay to the deceased Kshs.21,500/= per year. The said file was produced in evidence by Grace Wangeci (PW11) the Executive Officer at Nyahururu Law Courts.

In his testimony, the accused confirmed that he had separated with the deceased after 7 years and he married another wife. He had wanted them to reconcile but it did not materialize. He was ordered to be paying maintenance. He went to court in Nyahururu on 5/1/2010 as required of him but the wife did not turn up. He denied murdering the wife or knowing where Nderi Forest was; that he had even rented a

shop for deceased for two months and they used to communicate on phone and even meet; that he called her to collect money on 30/1/2010. He denied having gone for any celebration or knowing about the knife produced in court as an Exhibit.

**DW2** Anthony Maruru works with the accused. He said that on 1/1/2010, he spent the whole day and night at the accused's house with the wife Grace and their friends where they ate and drunk alcohol till the next day at 9.00am. On 3/1/2010. The accused informed him that the parents of Leah were asking whether he had seen Leah. On 11/1/2010, the accused informed him that he had heard of Leah's death over the radio. He insisted that the accused was at home on the day he allegedly murdered the deceased.

Having considered the evidence and submissions, no doubt this case turns on circumstantial evidence because nobody witnessed Leah's murder. The deceased went missing from her home in Kinamba on 1/1/2010 and her body was recovered in Nderi Forest in Kikuyu on 2/1/2010. For the court to rely and found a conviction on circumstantial evidence, the law is well settled. See the case of **Republic Vs. Kipkering** [1949]16 E.A 135. The said case was adopted in **Peter Maote Obero & Gedion Kamau Mburu Vs. Republic** CR.A 177/08 (MSA) where the court said this of circumstantial evidence;

**“It is the essence of circumstantial evidence that in order to justify an 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 guilt. It is also necessary before drawing the inference of the accused's guilt for circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference... with those safe-guards in place circumstantial evidence is as good as any direct evidence which is tendered and accepted as to prove a fact”.**

The ultimate question that the court will have to determine is whether there is sufficient evidence against the accused that irresistibly points at the accused as the person who committed the murder, to the exclusion of others.

It is not in dispute that accused and deceased had been married, had three children but had separated and the deceased went back to live with her parents. It is also not in dispute that the deceased had filed for maintenance in Nyahururu Children's cause No. 43/09. The deceased was seeking maintenance for the children from the accused. The accused did confirm that they were supposed to be attending court on 5/1/2010 but the deceased did not show up. It seems however that the parties had appeared before children's office in Naivasha where the accused had been asked to pay for maintenance and it seems he was doing so or had done so sometimes. **PW3** stated in her evidence that the deceased used to collect maintenance from Naivasha Children's Office.

**PW2** testified that on 27/12/2009, she had seen accused in company of the deceased at a place called Flyover though the deceased asked her to keep it a secret. **PW3** also testified that the deceased was going to meet the accused at Haraka Trading Centre on the 1/1/2010, where he was supposed to start for her a business. The accused did admit that indeed he had met the deceased on 27/12/2009. **PW3** said that whenever the deceased went to meet the accused she was happy about it which seemed to suggest that they were on relatively good terms.

The prosecution produced in evidence through **PW12**, an employee of Safaricom, the deceased's call data of her cell phone No.0711720338 (PEx.3) which captured the incoming and outgoing calls on the phone. The data shows that the deceased's phone 0711720338 called the accused's number 0711266782 several times between 31/12/2009 and 1/1/2010, the last call being at 3.41 p.m. on 1/1/2010. It is evident from this data that the accused and deceased were in contact and were indeed in contact on the day she went missing, on 1/1/2010. Unfortunately, the Investigation Officer made half baked investigations as regards the data captured by Safaricom on the deceased's phone. The Investigation Officer should have requested for the geographical data or location of the deceased at the time the calls were made and may be the conversations between the deceased and accused on the 1/1/2010. The evidence that has been adduced only goes to show that the deceased and accused communicated on phone on the material day and no more.

PW3 stated in her evidence that the deceased had been threatened with dire consequences by the accused's current wife, one Grace Wanjiku. The said Grace Wanjiku was arrested by police but released. The knife with initials J.M.N. was linked to Grace Wanjiku's mother whose names start with those initials but that evidence remains hearsay as no direct evidence pointed to the said Grace as having been involved in the death of the deceased.

During investigations, PW10 recovered from accused's house a shirt belonging to accused and which was said to have blood stains. The shirt was forwarded to the Government Analyst for investigations. Also forwarded to the Government Chemist was the deceased's blood sample, the accused's blood sample and the knife that was recovered at the scene where the deceased's body was found. Mr. Bichanga, counsel for the accused took issue with the blood that was submitted to the Government Analyst that was allegedly drawn from the deceased. PW10 was cross examined at length on where he obtained the deceased's blood from and he explained that he went to the City Mortuary with PC Kamande (PW7) of Kikuyu Police Station who had been present during the post mortem of the deceased and he got the blood. By the time the blood was allegedly obtained from the City Mortuary on 20/1/2010, the body of the deceased had long been moved to Chiromo Mortuary for preservation on 13/1/2010. There is no evidence from PW6, the doctor who performed post mortem that he drew any blood from the deceased during post mortem and that he had it preserved at the City Mortuary. Further, PW7 the officer who took part in the post mortem, never said that any blood was drawn from the deceased and preserved at the City Mortuary. The question raised by the defence is key, where did PW10 get the deceased's blood that was taken to Government Analyst? PW10's explanation was not satisfactory. It was necessary that the doctor who drew the blood from the deceased testify to that fact especially bearing in mind the fact that accused was arrested well after the post mortem had been conducted. It was not even disclosed when the deceased was buried. I find that there is a missing link in the prosecution evidence that needed to be filled, not only by PW10 but by PW6 and PW7 or any other doctor who may have drawn the deceased's blood. Lack of that evidence leaves a gap in the prosecution case as to whether indeed the deceased's blood was drawn and later taken to Government Analyst.

PW10 found blood on the accused's shirt about 20/1/2010 which he took to Government Chemist for analysis. This evidence coupled with the fact that PW2 knew that the accused was going to meet the deceased on the fateful day, the data from Safaricom confirmed that the accused was in touch with the deceased for most of that day till about 3.41 p.m., there is very strong suspicion that the accused was involved in the murder of his wife but because the prosecution left out a crucial link, this court has no option but resolve that doubt in favour of the accused person. Consequently, I find that the chain in the circumstantial evidence against the accused was not continuous but was broken by the lack of evidence establishing when the blood of the deceased was taken for purposes of analysis and comparison with other exhibits.

In the end, I acquit the accused of the charge of murder and he is set at liberty forthwith.

**DATED and DELIVERED this 22<sup>nd</sup> day of May, 2014.**

**R.P.V. WENDOHO**

**JUDGE**

**PRESENT:**

Mr. Bichanga for the accused

Mr. Nombi for the State

Accused present

