



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**CRIMINAL CASE NO. 28 OF 2011**

REPUBLIC.....PROSECUTOR

VERSUS

BENJAMIN WANYIRI MAINA.....ACCUSED

**JUDGMENT**

The accused **BENJAMIN WANYIRI MAINA** faces a charge of **MURDER CONTRARY TO SECTION 203 as read with SECTION 204 OF THE PENAL CODE**. The particulars of the charge were as follows

**“On the night of 26<sup>th</sup> and 27<sup>th</sup> day of August, 2011 at Wayani area Changamwe in Mombasa District within Coast Province jointly with others not before court, murdered PETER NDUATI KARUIRU.”**

The accused entered a plea of ‘*Not Guilty*’ to the charge. His trial commenced before me on 6<sup>th</sup> June, 2012. The prosecution led by **MR. ONSERIO** learned state counsel called a total of eleven (11) witnesses in support of their case. The accused was represented by **MR. TANUI** Advocate. The brief facts of the prosecution case are as follows.

The accused and the deceased who were friends were colleagues who worked together for Mobicom (K) Limited as salesmen. The accused however was dismissed from the company in May, 2011. **PW1 BERNARD MWANGI MAINA** told the court that he was the Mobicom area manager for Mtwapa. He was in charge of about 70 salesmen and he would issue out to them scratch cards which they would in turn sell to members of the public and remit the money to the company. **PW1** states that on 25<sup>th</sup> August, 2011 at about 5.00 p.m. he issued out scratch cards of various denominations to one **STEPHEN GITHIORE PW5** who was a group manager. **PW2** on his part told the court that he after collecting scratch cards from **PW1**, he in turn issued out scratch cards of various denominations to the deceased to go and sell. **PW5** recorded the serial numbers of the scratch cards which he had given out to the deceased in the Daily Issue Book **Pexb1**. On 26<sup>th</sup> August, 2011 both **PW1** and **PW5** noticed that the deceased had failed to remit the sale proceeds for the scratch cards he had sold. They questioned the deceased who told them that he was due to collect the money from his customers the following day. Then on 27<sup>th</sup> August, 2011 they received information that the deceased’s body had been recovered in the Changamwe area. The company immediately contacted the airtime providers to block the scratch cards which had been issued out to the deceased.

**PW6 MAINA GAKORI KURIA** told the court that he is the proprietor of a retail shop in Makupa. He

stated that he knew the accused well as a salesman who often used to sell him scratch cards. **PW6** testified that on 7<sup>th</sup> October, 2011 about 1½ months after the body of the deceased had been recovered the accused came to his shop and offered to sell to him scratch cards at a reduced price. **PW6** purchased scratch cards of different denominations including ten (10) cards of 100/= bearing serial numbers 10113010948420 to 10113010948429. The following day on 11<sup>th</sup> October, 2011 the accused returned to the shop of **PW6** and asked him to return the cards saying that they had been reported as stolen. **PW6** declined to return the cards to the accused as accused did not have with him his identity card. Instead **PW6** returned the said ten scratch cards to one 'Zam Zam Nkirote' a lady whom he knew as a salesgirl for Mobicom. **PW1** told the court that the said Zam Zam returned the said scratch cards to him. He checked the serial numbers and noted that they were the very cards which had been issued out to the deceased about two months earlier. The matter was reported to the police who traced and arrested the accused. After the completion of police investigations the accused was arraigned in court and charged with the offence of murder.

At the close of the prosecution case the accused was found to have a case to answer and was placed onto his defence. He opted to make a sworn statement in which he confirmed that he knew the deceased well both as a friend and a work colleague. However the accused denied any and all involvement in the murder of the deceased. It is now the duty of this court to determine whether the charge of murder has been proved beyond a reasonable doubt as required by law.

The offence of murder is defined by section 203 of the Penal Code as follows

**“Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.”**

This definition raises three (3) crucial ingredients for the offence of murder all of which must be proved beyond a reasonable doubt in order to prove the charge. These are

1. Proof of the fact and cause of death of the deceased
2. Proof that the deceased met his death as the result of an unlawful act or omission on the part of the accused and
3. Proof that said unlawful act or omission was committed with malice aforethought.

The fact of the death of the deceased is not in any doubt. **PW3 REBECCA NJERI KARAUARI** a sister to the deceased and **PW4 PAUL MTONGA KIHARA** a brother-in-law to the deceased both testify that following the recovery of the body at Changamwe they went to the mortuary where they were able to identify the body as that of their brother 'Peter Nduati Karauri'. Both witnesses state that they noted strangulation marks on the neck of the deceased. **PW8 SERGEANT MICHAEL ODUOR** is a gazetted scenes of crime officer. He told the court that on 27<sup>th</sup> August, 2011 he went to the scene of the incident at Woyani village in Changamwe. He found a dead body of a male adult lying on the ground. **PW8** took 13 photographs of said body which photographs he has produced in court **Pexb 1(a)**. **PW8** did also prepare and sign his report which he also produced as an exhibit **Pexb 1(b)**. The court was able to peruse the photographs. They depicted the body of an adult male with swellings to the neck.

Evidence with regard to the cause of death was tendered by **PW10 DR. NGALI MBUKO** a doctor attached to the Provincial Coast General Hospital who on 1<sup>st</sup> September, 2011 conducted the autopsy examination on the body of the deceased. **PW10** told the court that a mark on the neck, tongue was bitten and was protruding out of the mouth, bruises on the head, face and upper limb as well as a fracture of the neck bone. Based on his examination **PW10** opined that the cause of death was “*asphyxia i.e. lack of oxygen due to strangulation.*” **PW10** also noted that “*a string-like item had been tightened around the neck.*” He produced the post-mortem report as an exhibit **Pexb5**. This was expert medical evidence and was neither challenged and/or controverted by the defence. I therefore find that the deceased met his untimely death as the result of strangulation.

The next crucial question to be answered is whether it was the accused who so strangled and killed the deceased. There was no eye-witness to the events leading up to the death of the deceased. As such the

prosecution seeks to rely upon circumstantial evidence in order to prove the guilt of the accused. In the oft-quoted case of **REPUBLIC VS. KIPKERING arap KOSKE & ANOTHER [1949] EALR Vol. 16 Page 135**, the Court of Appeal for Eastern Africa set out the principles upon which a court could rely on circumstantial evidence as a basis for inferring guilt as follows

**“(1) That in order to justify, on circumstantial evidence 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, and the burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is always on the prosecution and never shifts to the accused.”**

Similarly in the **TEPER VS. REPUBLIC (2) [1952] AC 480** the Privy Council of England states as follows

**“It is also necessary before drawing the inference of the accused’s guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which could weaken or destroy the inference.”**

As stated at the outset there was no eyewitness to the murder of the deceased. **PW2 DORCAS MWERU** a sister to the deceased told the court that she last saw the deceased alive on 26<sup>th</sup> August, 2011. On this date at about 4.00 p.m. the deceased left their home in Mtongwe saying that he was going out to work. The same day at 8.00 p.m. the accused came to **PW2** and told her that he had been sent by the deceased to collect the keys to his [the deceased’s] shop where they normally slept. **PW2** was suspicious because she had been unable to raise the deceased on his mobile phone but nevertheless after questioning the accused as to whether he was a devil worshipper gave out the keys to the shop. **PW3** also a sister to the deceased who had also tried unsuccessfully to raise the deceased on his mobile phone, told **PW2** to bring accused to sleep in the house. It appears that the two sisters knew accused as a friend to the deceased who would at times sleep inside the deceased’s shop. When the accused was invited to go to the house he left saying that he was going to attend a prayer meeting in Mtongwe and never returned. The next day on 27<sup>th</sup> August, 2011 the family received news of the recovery of the body of the deceased in Changamwe.

The aspect of evidence which links the accused to the deceased is the fact that the accused was said to have been in possession of a series of scratch cards issued to the deceased after the body of deceased was recovered. This evidence needs to be examined carefully and in detail. The scratch cards in question were produced before the court as exhibits **Pexb2**. I have carefully examined them. They are ten scratch cards of orange mobile of 100/= denominations. The serial numbers of the ten scratch cards are as follows

- 10113010948420
- 10113010948421
- 10113010948422
- 10113010948423
- 10113010948424
- 10113010948425
- 10113010948426
- 10113010948427
- 10113010948428
- 10113010948429

It is clear that the ten scratch cards which are numbered chronologically are part of a series running from 420 to 429. **PW5** who was a supervisor at Mobicom told the court that on 25<sup>th</sup> August, 2011 he gave out to the accused several scratch cards for sale including those for 100/= denominations running from series 420 to 429. **PW1** recorded the serial numbers of the cards which he gave out to the deceased in the Issue Book. The said Issue Book was also produced as an exhibit in court and I was able to examine it **Pexb1**. I have seen the entry made for 25<sup>th</sup> August, 2011 indicating scratch cards issued out to various different employees. To ‘Peter’ [the deceased herein] it is clearly indicated were issued amongst others ‘Jaza 100’

scratch cards serial 10113010948420 – 484499. Bearing in mind the fact that a serial number is an exclusive identifying feature and that no two scratch cards would bear the same serial number it is quite apparent to me and I do find as a fact that the recovered scratch cards which were produced as exhibit in court **Pexb2** are the **very same** ten scratch cards which on 25<sup>th</sup> August, 2014 were given out by **PW5** to the deceased. The testimony of **PW5** in this respect has been confirmed by the evidence availed to the court.

The next logical question that would arise is where and in what circumstances were these scratch cards recovered. This is where the testimony of **PW6** '*Maina Gakori*' comes in. **PW6** told the court that he did not know the deceased at all. However **PW6** stated that he knew the accused well as a salesman who often came to his [**PW6**'s] shop in Makupa to sell to him scratch cards. On 7<sup>th</sup> October, 2011 (about 2 months after the death of the deceased) **PW6** states that the accused came to his shop and sold to him scratch cards of various denominations. The accused offered to sell the scratch cards to **PW6** at a lower price claiming that orange mobile were having a promotion. **PW6** says that he bought from accused ten (10) scratch cards at a price of Kshs. 880/= instead of at the normal price of Kshs. 920/=. **PW6** positively identified the accused whom he knew very well as the man who sold him the scratch cards. The two had interacted several times before and the accused was known to **PW6** as a Mobicom salesman. I find there would have been no possibility of a mistaken identity. **PW6** is also able to identify the ten '*Jaza 100*' scratch cards which the accused sold to him on that day **Pexb2**. **PW6** did tell the court that a few days prior to this a saleslady from Mobicom called '*Zam Zam Nkirote*' had also sold to him ten scratch cards for 100 denominations at a price of Kshs. 980/=. **PW6** asserted that he was well able to differentiate between the set of '*Jaza 100*' cards which he purchased from the accused and those which Zam Zam sold to him despite not recording the serial numbers of the cards because he kept the two sets of cards separately. It is very curious that just one day after selling the ten scratch cards at what he claimed was a bargain price to **PW6** the accused returns to take back the cards he had sold. Why was accused so anxious to get the cards back. Could it be that he had panicked upon realizing that the cards may implicate him? **PW1** and **PW2** stated that after the death of the deceased all the scratch cards which had been issued to him were blocked for use by the service provider. No doubt accused discovered this and realized that purchasers of the cards would raise complaints if they were unable to utilize them. Once customers complained to **PW6** then he would be able to trace the blocked cards to the accused.

I am mindful and do hereby warn myself that this amounts to identification by a single witness. However I was able to observe the demeanour of **PW6** as he testified. He gave evidence in an open, clear and concise manner. He remained unshaken under cross-examination by defence counsel. There was no evidence of any pre-existing disagreement or grudge which would cause **PW6** to fabricate evidence against the accused. This witness would have had nothing to gain by doing so. I found **PW6** to be an honest witness and I do accept his evidence as truthful.

In his defence the accused conceded that he knew **PW6** well. The accused states as follows

**"I knew Kuria Maina [**PW6**]. He had a shop in Kingorani. I have sold him scratch cards for over 1 year....."**

The accused goes on to concede that he did infact sell the scratch cards in question to **PW6**. He states in defence

**"I sold scratch cards to Maina on 26<sup>th</sup> August, 2011 at 10.30 a.m. I had gone there with the deceased. The deceased gave me the scratch cards to sell to Maina. It is not true that I went to sell cards to Maina on 7<sup>th</sup> October, 2011....."**

By this accused appears to concede to having sold the questioned scratch cards to **PW6** but claims that he went to the shop of **PW6** **together with deceased** on 26<sup>th</sup> August, 2011 a day before the deceased was found dead. I am not persuaded by this defence for the following reasons. Firstly the defence did not put this to the witness **PW6** at the time when he gave his evidence. At no time did defence counsel put to **PW6** that accused had gone with the deceased to his shop to sell scratch cards. This version has only

come up in defence. It is clearly an afterthought. Secondly if as accused claims the questioned cards were sold to **PW6** in August, 2011 it is highly unlikely that they would still be in his shop two months later. Scratch cards are fast-moving items and I would expect that cards of 100/= denominations would fly off the shelves quite quickly. It is inconceivable that two months after buying the cards **PW6** would still have them in stock in his shop. Thirdly there is no logical reason for **PW6** to insist that accused sold him the cards on 7<sup>th</sup> October, 2011 if infact he purchased them on 26<sup>th</sup> August, 2011. **PW6** was merely a shopkeeper. He had no stake in and no knowledge of how or where scratch cards were issued by the supplier Mobicom. **PW6** had no way of knowing that these particular scratch cards had been officially issued to the deceased (indeed **PW6** said he did not even know the deceased) and thus he had no motive to tilt his evidence in one way or another. As I stated earlier I did find **PW6** to be an honest and straight forward witness. He narrated the events just as they happened. I found him to be truthful witness. I therefore find as a fact that it was accused who two months **after** the murder of the deceased approached **PW6** and sold to him the ten 'Jaza 100' cards which had been issued to the deceased. Later realizing that the scratch cards may end up implicating him the accused tried to get them back. Accused admitted that he no longer worked for Mobicom and thus had no official access to their scratch cards. However **PW6** declined to hand them back to accused. **PW6** rightly demanded that accused leave behind his identity card number as proof that he had collected back the cards but accused did not have his identity card with him. **PW6** later handed the scratch cards back to the Mobicom authorities through another sales girl Zam Zam. I find the claim of evidence to be unbroken and it proves that the accused had in his possession scratch cards given out to the deceased two months after the deceased had been murdered. Accused has given no valid explanation of how the deceased's scratch cards came to be in his possession. It could be argued that the accused obtained these scratch cards from the person or persons who killed the deceased after the fact of his murder. Firstly the accused has himself made no such claim. Secondly such an explanation would be too coincidental as to be totally unbelievable. It would be too much of a coincidence that the deceased is murdered and scratch cards collected by him are found in the possession of the accused who is his friend and former colleague.

The inculpatory facts are incompatible with any other explanation or hypothesis. In the case of **KARIUKI KARANJA VS. REPUBLIC [1982]KLR** it was held that

**“In order for circumstantial evidence to sustain a conviction, it must point irresistably at the accused.....”**

This is precisely the case here. The evidence points at none other than the accused. The fact of the accused's possession of the scratch cards issued to the deceased is incompatible of any rational conclusion other than that the accused must have had a hand in the murder of the deceased. The action of the accused in trying to retrieve the scratch cards from **PW6** in my view is indicative of a guilty mind. I find that the chain of events amounts to far more than '*mere suspicion*'. I am satisfied on the basis of circumstantial evidence that the accused was involved in the murder of the deceased. I am satisfied that the *actus reus* of the offence of murder has been satisfactorily proved.

The final ingredient requiring proof in a murder charge is that of '*malice aforethought*' which forms the '*mens rea*' for the offence of murder. Malice aforethought is defined as follows by section 206 of the Penal Code

**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. ....
- c. ....
- d. ....”

By strangling a human being to the extent of causing a fracture of his neck (as was noted in the autopsy report) the only intention would have been to cause the death or at the very least to cause grievous harm

to the victim. In his defence the accused insisted that he and the deceased were close friends. The implication being that he would have had no reason (read motive) to kill the deceased. However **motive** and **mens rea** are two totally distinct and separate concepts. The law requires proof of malice aforethought (being the *mens rea*) only. There is no requirement in law that **motive** be proved. The establishment of **motive** may assist to explain the **reason** for an act of murder but the absence of motive does not in law negate a charge of murder. All that the law requires is proof of malice aforethought as defined in section 206 of the Penal code. In my view this has been satisfactorily proved. I therefore find that the prosecution have discharged their burden of proof and have proved this charge of murder. I therefore convict the accused of murder under section 203 of the Penal Code.

**Dated and delivered in Mombasa this 6<sup>th</sup> day of August, 2014.**

**M. ODERO**

**JUDGE**

In the presence of:

Mr. Mureithi for State

Mr. Onjoro h/b Mr. Matheka for Accused

Court Clerk Mutisya

Mr. Mureithi:

The accused may be treated as a first offender.

Court:

Hearing 7<sup>th</sup> August, 2014 for mitigation.

**M. ODERO**

**JUDGE**

**6<sup>TH</sup> AUGUST, 2014**

7<sup>th</sup> August, 2014

Before Hon. Lady Justice M. Odero

Mr. Kiprop for State

Mr. Matheka for Accused

Court Clerk Mutisya

Mr. Matheka:

I need time to prepare for mitigation.

Court:

Hearing 12<sup>th</sup> August, 2014 for mitigation.

**M. ODERO**

**JUDGE**

**7<sup>TH</sup> AUGUST, 2014**

12<sup>th</sup> August, 2014

Before Hon. Lady Justice M. Odero

Mr. Mureithi for State

Mr. Matheka for Accused

Court Clerk Mutisya

Mr. Matheka in mitigation:

I do submit that the accused is remorseful. He is distraught at the turn of events. He has a wife who is asthmatic and two children. He has never before been in trouble with the law. He was friends with deceased as they worked together. They even used to stay together. We pray for leniency. We urge court not to impose the death penalty. His children and family do depend on him.

Court:

Mitigation is noted. The offence is serious and a custodial sentence is called for. Accused is sentenced to serve thirty (30) years imprisonment. Right of appeal explained.

**M. ODERO**

**JUDGE**

**12<sup>TH</sup> AUGUST, 2014**