



REPUBLIC OF KENYA

High Court at Embu

Murder Case 14 of 2010

REPUBLIC..... PROSECUTOR

VERSUS

ELIUD NJERU MUGO..... ACCUSED

J U D G M E N T

ELIUD NJERU MUGO hereinafter referred to as the accused stands charged with the offence of murder contrary to section 203 as read with section 204 of the Penal code.

The particulars in the information are that the accused on 21st April 2010 at Ndatu shopping centre, Kithegi sub location, Kithimu location in Embu District within Eastern Province murdered **GRACE MUTHONI NDWIGA**.

The Prosecution called a total of 12 witnesses. On 21/4/2010 P.W.1 who is a motorbike transporter ferried the deceased from Kiangutu to Ndatu stage where he found Mwangi. As they chatted the accused came and talked with Mwangi. He asked Mwangi, "***Is that Muthoni***". Muthoni was from Msamaria bar. Mwangi responded in the affirmative. The accused then responded saying "***Today I must sleep with somebody***". He then left walking on the opposite side where the deceased was walking. There were people on this road. He learnt of the deceased's death the next morning. P.W.2 operates '***Starlight bar Msamaria***'. On 24/4/2010 between 8-9 pm he was at the bar when the deceased came there. She was drunk and had traditional liquor in a bottle. After doing some jigs she left. He too learnt of the death the next morning. P.W.3 was at Ndatu market at a pool place on 21/4/2010 night. While there the accused came in carrying a panga under his left armpit. This was around 10pm. This panga had blood on it. P.W.3 asked him about it and the accused shouted at him and then left through the back door. He had used light from a pressure lamp to spot the blood stained panga which was still wet. P.W.6 was also at the pool place with P.W.3. The former confirmed seeing the accused on 21/4/2010 at 10pm. He also saw him with blood stained panga. He was alerted to check the panga by P.W.3. The accused then left the hall. P.W.4 who had employed the accused testified that on 21/4/2010 morning she had given the accused instructions to follow her to the shamba after collecting fodder. He never came to the shamba. When she returned home she did not find him. The fodder was there. She did not find her only panga in his house. She waited for him in vain. The next morning she went to his house and found the panga but the accused's clothes were not there. She later learnt of a Murder. That night officers came looking for the accused but missed him. The next day they came for the panga which the accused used to use and she gave it to them.

P.W.8 the Government analyst was given certain exhibits for examination. They were;

- ***Black underpant***
- ***Pair of pink open shoes***

- ***Grey torn shorts***
- ***High Vaginal Swab of deceased***
- ***Blood, hair, saliva sample of the accused***
- ***Panga***
- ***Pair of black open shoes.***

P.W.8 did not detect any blood stain on the pink shoes, black shoes and panga. He however detected human blood on the black underpant and pair of grey short. Thirdly the High Vaginal Swab was not stained with seminal fluids or spermatozoa. He generated a DNA profile from the blood stains on the underpant and pair of shorts. He found them to match and they originated from an unknown female person (EXB 4). He further stated that the DNA in the hair and blood of the accused did not match any of the blood sample DNA. It transpired that the deceased's blood sample was never taken for analysis.

P.W.9's evidence is that he was at the stage with one Muvono when accused came by from the bar. After lighting his cigarette he told them he was going to cut somebody or eat somebody. The deceased came from the bar and accused followed her but on the opposite side of the road. He never saw the accused again. However in cross examination he stated that he had gone to the bar at 8pm and the deceased came there. She was joined by somebody and he left them there. He further stated that the accused had left before he saw the deceased.

P.W.10 is one of the officers who visited the scene on 22/4/2010 and collected several items from the scene. And on 29/4/2010 he accompanied the OCS to Ndatu market where a panga (EXB 1) was recovered. P.W.11 is the officer who took photographs of the scene and the accused. The body he said had a deep cut on the neck. P.W.12 observed 3 deep cuts on the head which was swollen. There was evidence that the body had been dragged to where it was. He recovered several exhibits from the scene which were taken to the Government Chemist for examination. These were torn grey shorts (EXB 7), Pair of pink canvas shoes (EXB 8), Jerrican (EXB 9), Black pant (EXB 6), Condom pack (EXB 12), Panga (EXB 1), pair of black canvas shoes (EXB 13). He indicated that he had arrested P.W.1 and P.W.8 because they had been on the road. He had however released them. He further stated that he charged the accused because P.W.1 and P.W.8 told him they had heard the accused say he would harm the deceased.

In his unsworn statement the accused stated that he was temporarily employed by P.W.4. On 21/4/2010 which was his last working day he woke up early to work. At 10.00am P.W.4 sent him for nappier grass at Mang'ang'as. He got it and carried it to P.W.4's. He finished this assignment at 4pm. He later went to Mang'ang'as to pay for the nappier. At 5.30pm he left for his place. He was at Ndatu market at 6.30pm and bought food and went home. He went on with his activities thereafter. Four days later he met the area chief M/s Njoki who later called C.I.D. Officer who beat him and arrested him. At Itabua police station cells he found P.W.6 and P.W.9. They too were murder suspects. He denied the charge. He did not call any witness.

M/s Njeru for the accused filed written submissions and she did not wish to highlight the same. Her main submission is that this was a case based on circumstantial evidence whose inculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other hypothesis than that of guilt. Ref:

1. MWITA -V- REPUBLIC [2004] 2 KLR 60

2. ERICK CHERUIYOT BILL -V- REPUBLIC NAKURU HCCRA NO 71/09.

This is now the case before Court for determination. The accused person faces a charge of murder contrary to section 203 as read with section 204 of the Penal Code. There is no dispute that the death of **GRACE MUTHONI NDWIGA** occurred on 21/4/2010. Dr. Silvester Maingi P.W.7 testified to that fact

and produced a post mortem report (EXB 3) confirming the said death. In the report he found the cause of death to be Head and Neck injuries due to traumatic assault using a sharp object. His report further confirms that this was not a natural death. This leads me to the next issue for determination. The issue is who committed this murder. There is no direct evidence linking the accused to this offence as no one saw him commit the said offence.

The evidence before Court is purely circumstantial and I would wish to analyse the same.

P.W.1 who operates a transport business of a motorbike started his business on 21/4/2010 at 8am. After transporting several people, the last person he transported was Muthoni the deceased. He carried her from Kiandutu to Ndatu stage. He remained chatting with **MWANGI** at the stage. He does not say where the deceased was. As they chatted the accused came by and talked with Mwangi. P.W.1 heard the accused ask Mwangi ***“Is that Muthoni?”***. Mwangi replied ***“Yes she is the one”***. The accused then said, ***“Today I must sleep with somebody”***. The deceased was from Msamaria bar and was walking on the road. The accused then left walking on the opposite side where the deceased was walking. In cross examination he said the deceased was drunk when he picked her from Kiandutu stage. Most importantly he stated that there were people on the road the deceased was using when all this was going on. So it's clear the accused was not the only person on the road. P.W.1 did not follow to see what may have transpired.

P.W.9 was at Ndatu market on 21/4/2010 evening. On the road he found one Muvono who had a motorcycle. The accused then came from the bar upto where they were. He asked for a matchbox and was given and lit cigarette. Accused then uttered words to the effect that he was going to cut somebody or eat somebody. He had no weapon on himself. A lady came from the bar and was on the opposite side of the road. The accused then followed her but on the opposite side of the road. This witness did not see the accused again. He later went home and slept. In cross examination he explained that the deceased had found him in the bar and was joined by somebody. He left them there. He further stated that the accused left before the witness saw the deceased leave the bar. Though he never saw people on the road he states that there were people standing on the road. It is therefore not clear what his answer was on this.

P.W.2 stated that he was in his bar on 24/4/2010. I think he meant on 21/4/2010. Between 8pm – 9pm the deceased came there with traditional liquor in a bottle. She sang and danced. The witness stated that the deceased was drunk. She left the bar thereafter. The evidence of P.W.1 and P.W.9 is that they saw the deceased on the road after she left the bar. And P.W.2 states that the deceased was already drunk as she came into the said bar. P.W.1 also confirmed that when he ferried her to the Ndatu stage she was already drunk. P.W.1 testified that the discussion where the accused allegedly said he was going to sleep with somebody was between the accused and Mwangi and not himself. The said **MWANGI** was never called as a witness. P.W.1 does not also say who it was that the accused was to sleep with. Somebody is not necessarily the deceased. P.W.1 in cross examination also indicated that this road the deceased was using while the accused walked on the opposite side had other people on it. It was the general direction to the deceased's home. He does not indicate that this road had exclusively been used by the deceased and the accused that night.

The evidence of P.W.9 is also in focus. He was with one Muvono at the road when the accused came to them. Accused allegedly said he was going to cut or eat somebody. He does not state who the accused was referring to. And he confirmed that the accused was not armed. Besides this there is no other evidence P.W.9 had to offer. He did not also say how he linked the accused to the deceased's death. Besides seeing the accused and deceased walking on opposite sides of the road while there were people on the same road there is nothing else he saw. It is true that if the accused uttered the alleged words he never said whom he was going to cut or eat.

It is the evidence of the investigating officer (P.W.12) that two witnesses (P.W.1 and P.W.9) had heard the accused say he would harm the deceased. This cannot be true because P.W.1 and P.W.9 testified before this Court and none of them stated so.

P.W.3 and P.W.6 have testified that the accused went to the latter's place of work on 21/4/2010 at

10pm carrying a blood stained panga under his armpit. When he was confronted by P.W.3 he walked away with his panga. This evidence by P.W.3 and P.W.6 was very crucial evidence.

These two witnesses were at a hall where a pool game was being played. It was 10pm. P.W.3 says they used a pressure lamp to provide light. P.W.6 however said it was a tin lamp they used for lighting. The two witnesses indicate that they saw fresh drops of blood on the panga which the accused was carrying. The accused stood next to P.W.3 while P.W.6 was 4 metres away from the accused. The blood was not dripping from the panga. Could light from a tin lamp illuminate the hall to the extent that P.W.6 could see drops of blood on a panga 4 metres from him? After the two witnesses saw the blood on the panga and even confronted the accused the latter left and the former did nothing.

P.W.4 explained to the Court how the accused left her home on 21/4/2010 and did not return that day. The next morning she found the panga he used to use in the house but his clothes were missing. The said panga was collected by the police two days after his disappearance. P.W.4 did not see any blood stains on the panga. It's also not clear if she had used this panga after the accused left as it appears to have been her only panga.

P.W.10 IP Ahmed Salat stated that the panga (EXB 1) in issue was collected from P.W.4's home on 28/4/2010. This was a week after the incident and not after two days as stated by P.W.4. P.W.10 did not state whether the panga had any blood stains when he recovered it. P.W.12 the investigating officer however testified that he and others recovered this panga (EXB 1) on 29/4/2010 and it had no stains. It was however sent to the Government chemist along with other exhibits for examination.

P.W.8 the Government analyst confirmed receiving several exhibits including the panga (EXB 1) for examination. He found **ONLY** the black underpant and pair of grey shorts to be moderately stained with blood. The rest had no blood stains. Secondly the High Vaginal Swab of the deceased had no seminal fluids nor spermatozoa. There had been mention of finding of an empty packet of condoms. There were no used condoms recovered. Had these been recovered they may have assisted in the investigations.

Thirdly the investigating officer did not deem it fit to get a blood sample of the deceased person. The findings by the Government analyst (P.W.8) were that the blood stains found in the black underpant and pair of grey shorts originated from an unknown female person. Was this unknown female person the deceased herein? Even if she was the one there is no evidence showing whether the black underpant and the grey shorts belonged to the deceased or the accused person. Besides this evidence of the Government analyst, the other evidence on record is purely circumstantial. This is the evidence of P.W.1, P.W.3, P.W.6 and P.W.9. It is circumstantial because none of these witnesses witnessed the accused committing this offence. P.W.1 and P.W.9 separately saw the accused walking on the opposite side of the road that the deceased was using. They have also confirmed that the road where the deceased and accused were walking is a public road and there were other people using it at the said time. They did not witness the deceased and accused walking together and neither did they see them together physically. They only heard about the death of the deceased the next day.

Besides this, P.W.1 states that the accused had told one Mwangi in his hearing, ***"Is that Muthoni?"*** And on being answered in the affirmative he further stated ***"Today I must sleep with somebody"***.

First of all Mwangi never testified before this Court. He could have shed some light on the kind of chat he had with the accused and whether the latter told him he was going to sleep with the deceased. P.W.9 who was not with P.W.1 nor Mwangi says he was with Muvono. Again Muvono never testified herein. P.W.9 states that the accused told him **he was going to cut or eat somebody**. He had no weapon. And after saying these words he followed the deceased who had emerged from a certain bar. They walked on opposite sides of the road. Again its clear that the accused did not tell P.W.9 that he was going to cut and/or eat the deceased.

From the above narrative of P.W.1 and P.W.9's evidence it emerges that these two witnesses were not at the same place. So they were not together. It is therefore not clear how many times the deceased emerged from the bar and was followed by the accused on the opposite side of the road. Which was this

point on the road that the accused followed the deceased? Did any of these other people on the road see what may have happened between the accused and the deceased if the evidence of P.W.1 and P.W.9 is anything to go by?

P.W.3 and P.W.6 have stated that on this material night they were with the accused in a POOL HALL in Ndatu. And that the accused had a blood stained panga with him. P.W.3 questioned the accused about it and the accused took off. They never followed up the issue and they did not report it anywhere. The panga produced before this Court was recovered from P.W.4 about 8 days after the incident. Its not clear if P.W.4 had been using the panga. She had however in her evidence told the Court that this was her only panga and when she missed it on 21/4/2010 she had to borrow one from her neighbours. She however found this one (EXB 1) the next day in the house used by accused. It is therefore likely that upon finding the panga she just continued using it. So if at all there had been any blood on it (which she never anyway mentioned) the same was tampered with. And that's why P.W.9 could not trace any blood stains on it.

P.W.3 and P.W.6 were in the same POOL HALL when the accused allegedly joined them with the blood stained panga under his armpit. The time was 10pm so how were they able to see the blood on the Panga?. P.W.3 stated that he used a pressure lamp in the said hall. P.W.3 was just a customer. P.W.6 who was more of a proprietor and knew the place better said the light in the Hall was from a tin lamp. It is obvious that one of these two witnesses was not speaking the truth.

The above analysis presents the evidence that the Prosecution relied on to charge the accused who has denied the said charge. The accused in his unsworn defence explained how he spent the day of 21/4/2010 and finally went to his home after purchasing food stuffs at Ndatu at 6.30pm. He was arrested four days later and found P.W.6 and P.W.9 having been arrested. P.W.6 and P.W.9 are some of the witnesses who have given shaky evidence herein.

Circumstantial evidence has been defined as evidence that tends to prove a fact indirectly by proving other events or circumstances which afford a basis for reasonable inference of the fact in issue. The circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. So what criteria should circumstantial evidence satisfy to sustain a conviction? In the case of *NZIVO -VS- REPUBLIC [2005] 1 KLR 699* it was held as follows;

“In a case dependent on circumstantial evidence in order to justify the inference of guilt the incriminating facts must be incompatible with the innocence of the accused or the guilt of any other person and incapable of explanation upon any other reasonable hypothesis than that of his guilt. 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 would weaken or destroy the inference”.

The Court of Appeal had earlier on in the cases of;

1. *MWITA -VS- REPUBLIC [2004] 2 KLR 60 and*
2. *MWANGI & ANOTHER -VS- REPUBLIC [2004] 2 KLR 32*

made a similar observations. In the *MWANGI CASE (Supra)* it had said;

“It may be asked; why is the Court of Appeal looking at each circumstance separately? The answer must be that in a case depending on circumstantial evidence each link in the chain must be closely and separately examined to determine its strength before the whole chain can be put together and conclusion drawn that the chain of evidence as proved is incapable of explanation on any other reasonable hypothesis except the hypothesis that the accused is guilty of the charge”.

In the evidence before this Court the range of suspects is wide, including some of the Prosecution witnesses.

Secondly the deceased was already drunk as she was brought to Ndatu market by P.W.1. This was a fact well known to P.W.1. This is confirmed by P.W.2 who runs a bar. The deceased went to his bar while carrying a bottle of traditional liquor. She was already drunk and she sang and danced in there.

P.W.9 was in the bar when the deceased came there. She was joined later by someone. P.W.9 then left them there. Who is this person whom the deceased was let with in the bar that night?. Was it the same bar where P.W.2 had seen the deceased? Its not clear. The investigating officer (P.W.12) was told by villagers that the deceased was a casual labourer and had left in the morning and did not return. She lived alone but used to be visited by a certain man. P.W.12 did not try to find out the identity of this man or even find out if he could have been linked to this murder. He also did not find out the identity of the man P.W.9 had left the deceased with in the bar, and where this man had gone to.

In the face of such circumstantial evidence its the duty of the investigating officer to piece up all facts together to make his case. P.W.12 and others were not keen enough to fill the gaping holes in their case. The discourse above where I have keenly analysed every evidence in the chain link confirms that. I do find the circumstantial evidence to be so weak. I also find there to be other co-existing circumstances as clearly set out above which have weakened further any inference that may have been made. The evidence on record is too weak to dislodge the accused's defence and/or place the accused at the locus quo. The accused will benefit from the doubt created in the Court's mind in relation to his participation in the commission of this offence. The accused is therefore acquitted under section 322(1) Criminal Procedure Code. He will be released unless otherwise lawfully held under a separate warrant.

DATED AND DELIVERED AT EMBU THIS 14TH DAY OF MARCH 2013.

**H.I. ONG'UDI
J U D G E**

In the presence of;

Ms Miiri for State

M/s Njeru for accused

Accused

Njue – C/c