



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

MURDER CASE NO. 69 OF 2010

REPUBLIC.....PROSECUTOR

VERSUS

NANCY WANJIKU NGUGI.....ACCUSED

**JUDGMENT**

Nancy Wanjiku Ngugi faces a charge of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**. The accused is alleged to have murdered David Ngugi Chege on 26/6/2010 at Farainya Village in Kipipiri District within the Central Province. She denied the offence. The prosecution called a total of eight witnesses. The accused was called upon to enter her defence and she made a sworn statement but called no witnesses.

The deceased was a husband of the accused and the first witness to be called in Patrick Kimani (PW1), is their son. He was aged about 15 and gave evidence on oath. PW1 recalled that the father (deceased) came home on 26/6/2010 at about 8.00 p.m. while drunk. He was at home with the accused and his brother, Zacharia Chege (PW2), and other 2 smaller children. The deceased left again for the club and came back about 8.30 p.m., staggering and told them to go back to Nakuru town where they came from. The accused replied that they would not go anywhere and it is then the deceased got hold of the accused by the neck, started to strangle her, made her fall. PW1 took the young child which the mother was holding and ran into the maize plantation. From there, he could hear their mother screaming saying that the deceased wanted to kill her. The screams subsided after about a half an hour and he found that the parents had left the house and were outside near the gate. He noticed that the deceased was bleeding from a wound on the left side of the face near the mouth and was bleeding a lot and the mother stood by, looking shocked. He noticed a club and fork jembe near the scene. The club had been in the kitchen and fork jembe had been used in the garden day and had been kept at the door. He called his brother, PW2 who had gone for a call. They carried the deceased into the house and placed him on the sofa. The accused did some first aid by applying salt to the wound. PW1 and PW2 then went to call their grandmother who lived nearby but she declined to go to the scene. They went to call their aunt, a sister to the mother who got a vehicle and they took the deceased to hospital. The accused was not injured.

Zacharia Chege (18 years old) stated that on 26/6/2010, he was at home with his other siblings at about 9.00 p.m. The father had gone to Farainya centre at 8.00 p.m. PW2 went for a call at about 9.00 p.m. and then heard the mother screaming. He went to where the parents were, found the father (deceased) lying on the ground. He called PW1 who was hiding in the maize plantation with the small child. He noted that the father was bleeding from the nose and there was a wound (hole) on the left side of the mouth. They took him to the house and went to inform their grandmother to get a vehicle but she refused to get out of her house. They went to call their aunt to help take the deceased to hospital but upon return, found the

deceased had died. Their uncle called the police who took the body away and arrested the accused. PW2 did not see any injuries on the accused.

James Mwangi Chege (PW3) is a brother to the deceased. He said that he went to bed at about 9.00 p.m. on 26/6/10. His mother called him and informed him that there had been a fight between the deceased and accused and she asked him to go and find out what had happened. On going, he did not find the accused and the children while the deceased lay on a chair with an injury on the left side of the face. He went to call his brothers from where they were watching football and they went to report at the Police Station. The accused came back about 10.00 p.m. and was arrested and taken to the police station and the deceased's body was taken to mortuary.

Samuel Gachuhi Chege (PW4) is an elder brother to the deceased. He was watching football at Farainya when he was informed that the deceased was injured. He went to the deceased's house where he found him lying on the sofa set and was injured on the left side of the face. He went to report the incident to the police who later came to pick up the body.

Perisima Njeri Ngonyo (PW5) is the deceased's mother. She recalled that she was asleep on 26/6/10 when the accused called her and informed her that she had fought with the deceased and that the deceased had fallen and could not breath. She called PW3 and asked him to go and see what had happened.

CPL John Rono, (PW6) of Kipipiri Police Station was on duty on 26/6/10 at about 11.40 p.m. when he received a report of murder from the deceased's brother. He proceeded to the scene with other police officers. On the way, they met the accused being taken to the station. At the scene, he found the deceased's body on a sofa with injuries on the left side of the face. He saw two penetrating wounds, one next to the mouth and a lot of blood. He interrogated the accused and PW2 and recovered a stick used in assaulting the deceased. Next day, he again recovered a fork (jembe) at the scene because it could have caused the 2 sharp penetrating wounds although it had no blood stains. He also noted that there was a struggle in the compound because there was blood spilled all over the compound.

Dr. Jackson Macharia (PW7) of Ol Kalou District Hospital performed the post mortem on the deceased on 1/7/2010, after the body was identified to him by Daniel Chege and another. He found that the deceased had two sharp penetrating wounds on the left side of the face each 1.5cm x 1.5 cm in diameter, 4cm apart; a fracture of the temporal and parietal bone on the left side of the head and cut wound on the left side of the leg; fracture of the mandible; there was also internal bleeding. He formed the opinion that the cause of death was pulmonary arrest due to severe head injury secondary to severe fracture to the head. The post mortem report is PEx.1. The accused was also examined by Dr. Kiamba who found her to be fit to stand trial (PEx.5). Cpl Joel Koskei of Scenes of Crime received a film from PC Peter Mhuru requesting him to process it which he did. Photographs were produced in evidence.

When called upon to defend herself, the accused testified on oath that prior to the 26/6/10 the deceased had talked about dying. On 26/6/2010, they worked on the shamba and the deceased left for the club at 4.00 p.m. She told the children that if the deceased came back home with violence and asked them to leave they should do so. The deceased returned home about 9.00 p.m. Zacharia opened for him and Patrick was at the door waiting to go out. He asked for Chege, but he escaped and left. The accused said that the deceased was very drunk and had a mark on the cheek which was bleeding. The deceased asked accused if she knew that that was his house and held her by the neck, kicked her on the left side and she managed to push him and he fell and became unconscious. When she screamed, PW1 took the child she was carrying. She screamed for help but nobody went to her aid. She went to inform her mother-in-law (PW5) but she refused to open. She denied injuring the deceased or attacking him with the folk.

I have now considered all the evidence on record and the submissions of counsel. There is no direct evidence to the effect that the wounds found on the deceased were inflicted by the accused person. This case therefore turns on circumstantial evidence. For such evidence to found a conviction, the court must closely examine it. In the case of Peter V. R (1952) AC at Pg 489, Lord Marned said:-

**“circumstantial evidence must always be narrowly examined, if only because evidence of this kind**

**may be fabricated to cast suspicion on another .... 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."**

It is settled law that for the court to convict based on circumstantial evidence, the evidence must point irresistibly to the accused person's guilt the exclusion of any other person. At the same time there must be no co-existing factors or circumstances which may be weaken or destroy the inference of the guilt of the accused person. This is what the court held in **R. V. Kipkering Arap Koske (1949) 4 EACA 135**.

On the night of 26/6/10, the accused was with her children who included PW1, PW2 and other younger children. The accused does concede that upon the deceased returning home while drunk, a scuffle started between them when the deceased attacked her and started strangling and kicking her. PW1 did also testify to the deceased picking a quarrel by demanding that they leave for Nakuru and on accused saying they could not, the deceased started strangling the accused and a scuffle ensued. PW1 took the child whom accused was holding and ran into the maize plantation. PW2 had left and did not return till he came back to find the father injured. PW1 only heard the mother screaming claiming the father was killing her. The next time PW1 saw his parents, they were outside the house, the deceased was injured on the face was bleeding and lying down while the accused was standing there looking shocked. There is no evidence that anybody else came into that compound at that time. PW1 left the parents fighting when he ran into the maize and when screams subsided, he came out of the maize plantation and found them alone but the deceased was now seriously injured and had fallen. The accused claims to have merely pushed the deceased and that he came home with the injury on the face. If the deceased had come home with the injury on the face PW1 would have seen it. PW1 saw the injury on the deceased after the fight between the deceased and accused. The injuries on the deceased must have been inflicted during that fight/scuffle and the only conclusion I come to is that it is the accused who inflicted the injuries on the deceased and I do find that the circumstantial evidence points to none but the accused as the one who inflicted the fatal injuries on the deceased. She had the opportunity to do so.

What weapons were used to injure the deceased? Both PW1 and PW2 who were the first to see the deceased after he was injured saw a wound which they also referred to as a hole and he was bleeding. The prosecution produced in evidence a club (stick) and fork jembe which were recovered in the compound where the murder was committed (Ex.2 & 3). The stick and fork did not have any blood stains nor did anybody see the accused use them in assaulting the deceased. However, PW1 told the court that before the fight, the club (stick) had been in the kitchen but was found outside in that compound where the fight took place. He also said that before the fight, the fork jembe has been used in the shamba on that day and was kept next to the door. However, it was recovered by PW6 who said he found it near the fence in some grass. The doctor (PW7) who performed the post mortem on the deceased found two penetrating wounds which were inflicted by a sharp object while others to the head may have been inflicted by a blunt object. Though the doctor agreed that blunt object may include a fall, it is likely that the club was taken from the kitchen and was used during the fight. The fork jembe had also been moved from where it had been and it is the likely weapon used to inflict the two penetrating wounds on the left side of the deceased's face. Despite the lack of blood on the fork and club, I find that they are the likely weapons used by the accused in assaulting the deceased.

Was there malice aforethought? From the evidence of PW1, it is the deceased who first attacked the accused and started to strangle her and a scuffle ensued. PW1 also told the court that though the fight started in the house, it ended up outside in the compound near the gate. PW6 who visited the scene also found the compound had blood spilled all over the compound and he was of the view that was evidence that there was a struggle. PW1, who I believe was a truthful witness recalled that their father used to be violent when drunk and would pick quarrels with them and their mother. PW2 corroborated that evidence. Both PW1 and PW2 also said that their grandmother would not intervene as was evident on this night. When called to the scene, by PW1 and PW2 and even the accused, she refused to go. The deceased's brothers, PW3 and PW4 blatantly denied that the deceased was a drunkard and violent to his family, they were not able to tell the court why the deceased and accused lived apart most of their lives. They were also not candid as to whether or not they knew the deceased's family yet they lived in the same compound and claimed to have had good relations with the deceased. They did not impress the

court as being truthful about the accused and deceased's relationship. PW5 the deceased's mother too seems to have had a restrained relationship with the accused and was not willing to help. From the reaction of PW1 taking the child away on seeing his parents get into a scuffle, I do believe PW1 and PW2's evidence that the father was a drunkard and was drunk on that night and came home and provoked the accused as a result of which there was a fight. Despite the scuffle PW1 and PW2 said that the accused did first aid to the deceased by cleaning the wound with salt. That is not the reaction of a person who intended to murder.

PW7 upon examining the deceased's found that he had several injuries, two penetrating wounds on the face near the mouth, fracture of the mandible, fracture of the temporal and parietal bones, cut wound on the lower limb. The multiple injuries inflicted on the deceased cannot have been in self defence.

To establish malice aforethought, the evidence must demonstrate be an intention to cause death or to do grievous harm to any person, whether that is the person killed or not, knowledge that the act or harm causing death will probably cause the death of or grievous harm to the person, an intention to commit a felony and lastly an intention by the act or omission to facilitate the flight or escape from custody of any person who committed or attempted to commit a felony (S. 206 of the Penal Code). In this case, there is no evidence that the accused intended to harm the deceased but it all started when the deceased attacked her. The accused, however, used excessive force in defending herself if at all, as a result of which the deceased lost his life. This court does not accept the accused's explanation that she merely pushed the deceased and he fell and died. The same is rejected as untrue.

In the end I will find that the accused did not have an intend to kill the deceased and I will therefore acquit her of the offence of murder contrary to Section 203 as read with Section 204 of the Penal code but instead will find her guilty of the offence of manslaughter contrary to Section 202 of the Penal Code and she is convicted accordingly.

**DATED and DELIVERED this 17<sup>th</sup> day of February, 2012.**

**R.P.V. WENDOH**  
**JUDGE**

**PRESENT:**

Ms Idagwa for the State.

Ms Njoroge for the accused.

Kennedy – Court Clerk..