



REPUBLIC OF KENYA
IN THE HIGH COURT
AT NAIROBI
MILIMANI LAW COURTS
CRIMINAL CASE NO. 59 OF 2009

REPUBLIC**PROSECUTOR GENERAL**

VERSUS

PAUL MWAURA WAGACHA.
ACCUSED

JUDGMENT

The accused, **PAUL MWAURA WAGACHA**, was charged with the offence of Murder **contrary to section 203 as read with Section 204 of the Penal Code.**

The prosecution called seven (7) witnesses. Thereafter, when the accused was put to his defence, he gave a sworn testimony but did not call any other witnesses.

PW 1, LUCY WANJIRU MBUCU, worked as a waitress at a bar called “Club 3”. The said bar is located at Kianjogu, off- Limuru Road.

On 21st June 2009, at about 3.00p.m. **PW 1** saw about ten young men who were playing cards outside a building that was next to the one within which the bar was located.

According to **PW 1**, the ten young men continued playing cards until about 7.00p.M, when she heard them arguing or fighting. Her attention was attracted by a commotion outside the bar. She went out and found nine of the young men beating up the accused. They were kicking and boxing him.

It was the evidence of **PW 1** that the accused had told the other young men to stop playing cards at that place.

PW 1 stepped out from the bar and saw the fighting. She then returned into the bar, as she needed to give bulls to the customers she had served.

After about 20 minutes inside the bar, **PW 1** went outside again. She heard somebody screaming that he had been stabbed. The victim of the stabbing was not known to **PW 1**.

PW 1 saw the intestines of the victim protruding out, whilst he was being carried to the roadside, from where a taxi ferried him to hospital.

According to **PW 1**, the accused made good his escape from the nine young men, when the victim of the stabbing had already screamed that he had been stabbed.

During cross-examination, **PW 1** said that the accused did not join the other young men when they were playing cards.

PW 1 also testified that when the accused left the bar, he was not carrying anything.

According to **PW 1**, it was dark when the victim was stabbed: She said that it was about 7.45p.m.

Finally, **PW 1** said that she did not see the person who stabbed the victim.

PW 2, ZAKAYO KIENI KAMAU, operates a taxi. On 21st June 2009, at about 8.00p.m, he was at "Simpson's Bar, Makuti", when he got a phone-call from his electrician friend. The said friend asked him to fetch a patient from Kang'au, which was about one kilometre from Ndenderu, where he operated from.

He rushed to the scene, where he picked up the patient, and then took him to a local clinic, popularly called "Kwa Jamba". After the patient had been given first-aid, he was referred to Kiambu District Hospital.

PW 2 drove the patient to the Kiambu District Hospital.

Whilst **PW 2** was ferrying the patient to hospital, he noted that the patient had blood on the left part of his abdomen.

Four days after **PW 2** ferried the patient to hospital, he learnt that the patient had died.

Meanwhile, when **PW 2** was ferrying the patient to hospital, he was accompanied by two (2) young men. He did not know the said young men, but they provided him with the mobile phone number of the patient's mother (**PW 3**). He was therefore able to phone **PW 3**, to inform her that he had taken her son to hospital. They then discussed how **PW 3** would pay him for the services he had rendered.

PW 3, GRACE WAMBUI, was the mother of the deceased, ERICK MUTHANGA MUNGAI.

According to **PW 3**, it is her daughter who phoned, to let her know that Erick had been stabbed with a knife. Apparently, **PW 2** had not phoned **PW 3** directly; he phoned **PW 3's** daughter.

As it was late by the time **PW 3** received the message, she first visited her son in hospital, on the following way.

Meanwhile, when **PW 3** met **PW 2**, the latter was in the company of two young men. **PW 3** recognized those young men as NJOROGE and KAMAU. She told the court that Njoroge was her nephew, whilst Kamau was her neighbour.

Those two men said that they had been with the accused at Kianjogu, when the deceased was injured.

PW 3 testified that the 2 young men told her that a fight ensued between the accused and the deceased, where all of them had been gambling.

When **PW 3** visited her son in hospital, the son did not tell her anything. The doctor told **PW 3** that her son was seriously ill. In fact, **PW 3** did not even talk to her son, as she was only allowed to see him

through some curtains.

PW 3 testified that she was told by Kamau that it is the accused who had stabbed her son, the deceased.

When asked about Njoroge and Kamau, **PW 3** told the court that they were both students. They were also friends to the deceased.

Similarly, the accused used to be a friend of the deceased, and he used to visit the deceased at **PW 3**'s home.

PW 3 added that the accused and the deceased used to relate very well. She said that the accused and the deceased did not have any bad relations.

During cross-examination, **PW 3** said that although Kamau told her that the deceased had been stabbed, Kamau did not know what was used to stab the deceased.

PW 4, CPL WILSON BITOK, was the police officer in-charge at the Rueno Police Post, as at 26th June 2009. That police post was under the Kiambu Police Station.

Whilst **PW 4** was at the post, the accused, who was a suspect in a murder case, surrendered himself to the police.

It was the evidence of **PW 4** that a report had been made at the Rueno Police Post on 22nd June 2009, that the accused was a suspect in a case of murder. That report was made by **PW 3**. Therefore, when the accused presented himself at the post, on 26th June 2009, **PW 4** arrested him.

PW 4 produced the O.B. from Rueno Police Post to prove that 2 reports were made to the police. In the first report, it was said that the victim had been seriously injured by being stabbed. At that time, the victim was admitted at the Kiambu District Hospital.

The second report was made after the victim passed away.

During cross-examination, **PW 4** said that when **PW 3** reported the incident of assault on her son, she said that the victim had been assaulted by a known person, whose nickname was Lopez.

PW 4 said that that was the nickname of the accused herein.

PW 4 also said that when the accused presented himself to the police, he told **PW 4** that the reason why he had gone into hiding for about 4 days was that the "Mungiki" were looking for him.

However, **PW 4** did not seek to find out why the "Mungiki" should have been looking for the accused.

The reason why **PW 4** did not seek to find out why the "Mungiki" were looking for the accused is that that police officer's only role in the case was that of an arresting officer. He said that he was not the Investigating Officer.

PW 5, Acting INSPECTOR GESAINA KIRIBO, was the Investigating Officer. He started his investigations by questioning the accused person.

PW 5 testified that the accused told him that he was playing cards with the deceased at the Kianjogu Trading Centre. When the deceased won, the accused got annoyed, and he ordered the deceased to leave.

A fight ensued, leading to the accused stabbing the deceased in the stomach.

The accused is said to have told **PW 5** that he went into hiding because the "Mungiki" were looking for

him. The reason why “Mungiki” were looking for the accused was that he had allegedly stabbed one of their member.

Although what the accused is alleged to have told PW 5 amounted to a confession, **PW 5** told the court that the accused did not sign any confession.

PW 6, DR. ZEPHANIA KAMAU, is a medical doctor. He examined the accused and assessed his age as 34 years. He also found that the accused did not have any physical injuries. Finally, he found that the accused was mentally fit.

PW 7, DR. DOROTHY NJERU, was a forensic pathologist. She conducted the post mortem examination on the body of the Deceased, Eric Mungai Wagacha.

The body had a sutured surgical wound on the stomach, and another wound on the left groin region.

Internally, **PW 7** found that the heart and blood vessels on the left region, had been severed. There was blood in the abdominal cavity.

The doctor formed the opinion that the cause of death was abdominal and vascular injuries, following trauma by a sharp object.

The doctor explained that vascular injuries are injuries to the blood vessels.

The injuries could have been caused by anything which had a cutting edge, such as a knife or a sword.

The prosecution closed its case after **PW 7** testified. Thereafter, the accused was put to his defence. He gave sworn testimony.

The accused said that the deceased had been his friend for a long time. He said that on the material day he was at the bar called “Club 3”, which is located at Kianjogu Shopping Centre.

He testified that about ten (10) people were gambling outside the building which houses his father’s Hardware shop. It is at that Hardware shop that he used to work prior to the incident.

The accused told the 10 men to stop gambling at that place. He then returned into the bar.

Whilst he continued drinking, the accused heard an increase in noise from the persons who were gambling. He therefore went out again, to tell them that they should stop gambling. But they then grabbed him and beat him up.

Fortunately, he managed to escape, and run away. As he was running away, he heard the people saying that someone had been injured. They therefore vowed to look for him, to kill him.

He later learnt that the deceased, Eric Mungai, had been stabbed in the stomach.

As the Mungiki were looking for him, the accused moved from their home at Kianjogu, and went to their other home at Ongata Rongai.

When his brother informed him that the police were looking for him, the accused presented himself to the police at the Ruiru Police Post.

The accused said that he did not know who stabbed the deceased. He denied having told **PW 5** that it is he (the accused) who had stabbed the deceased.

Having now given due consideration to the evidence adduced, I note that the accused has confirmed that he was present at the scene of crime when the deceased was injured.

Secondly, **PW 1** confirmed that the accused was not one of those who were gambling outside the bar.

PW 1 testified that the victim was stabbed at about 7.45p.m, when it was dark.

Some of the people who were with the deceased were identified as Njoroge and Kamau. Those two were students, who were also close friends to the deceased. It is they who told **PW 3** (the mother of the deceased) that it was the accused who fought with the deceased.

However, just like **PW 1**, the said Njoroge and Kamau did not see the weapon, instrument or implement that was used to stab the deceased.

In effect, none of the witnesses saw the accused inflicting the injuries on the deceased.

If anything, **PW 1** said that the accused was being beaten up by those who had been playing cards.

It is evident that there was no eye-witness who gave evidence in court. Therefore, as the identity of at least two of the alleged eye-witnesses was disclosed, this court finds that the prosecution has failed to make available essential witnesses. The said failure has deprived the court of vital evidence that may or may not have linked the accused to the act which caused the deceased to suffer the fatal injuries.

As regards the defence, I am satisfied that the accused has offered a reasonable explanation for having gone into hiding after the incident.

PW 5 corroborated the defence by confirming that immediately after the accused was arrested, he (the accused) told the Investigating officer (**PW 5**) that the Mungiki had been looking for him, with a view to taking his life. Regrettably, although **PW 5** was given that information as early as 27th June 2009, the Investigating Officer failed to investigate the matter.

Therefore, it is possible that what the accused said, as his reason for going into hiding for four (4) days was true. That would imply that his conduct was not simply attributable to his guilt, in the stabbing of the deceased. He may well have been preserving his own life, which the Mungiki had threatened to take away.

It is common ground that the deceased and the accused had been close friends. The prosecution has tried to show that the accused attacked the deceased because the deceased had won a game of cards.

But the persons who were playing cards had done so between 3.00p.m. and about 7.45p.m. There is no evidence that there was anything in particular, about the win by the deceased, at about 7.45p.m, that could have triggered the fight between him and the accused.

In any event, **PW 1** said that the accused was never a party to the games that the other persons were playing.

Therefore, if the accused was not one of those playing cards, he would have had no reason to attack his friend for winning a game which he was asking all the players to stop.

The circumstantial evidence adduced falls short of demonstrating that the same were consistent only with the guilt of the accused.

As about 10 persons were involved in some altercation, and because nobody saw the accused carrying any instrument or weapon either before or at the time when the deceased was injured, this court finds that the prosecution had failed to prove that it is the accused who murdered the deceased.

I therefore find the accused “Not Guilty”. He is acquitted. I order that he be set at liberty forthwith unless he is otherwise lawfully held.

Dated, Signed and Delivered at Nairobi, this 4th day of June, 2012.

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FRED A. OCHIENG

JUDGE

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