



**REPUBLIC OF KENYA**

**IN THE HIGH OF KENYA AT MACHAKOS**

**Criminal Case 30 of 2005**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**MUTANGILI KATIWA.....ACCUSED**

**JUDGMENT**

The plea in this case was taken almost 7 years ago on 4<sup>th</sup> October, 2005 by **Wendoh, J.** Thereafter the case went through the hands of **Wendoh, J Onyancha, J** and **Sitati, J** without being heard for one reason or another between 4<sup>th</sup> October, 2005 and 17<sup>th</sup> February, 2009. On 17<sup>th</sup> March, 2009 the hearing commenced before **Lenaola, J.** However, I can only say that the delay is regrettable.

Anyhow, by information dated 18<sup>th</sup> August, 2005 the accused was charged with murder contrary to section 203 and 204 of the Penal Code. It was alleged that on the 16<sup>th</sup> April, 2005 at Muambani Village, Muusa Sub-location of Mbitini Location within Kitui District of Eastern Province, he murdered **Joyce Wanjiru Mutangili.** The accused pleaded not guilty to the information and the hearing as already stated or formally commenced before **Lenaola J.**

**Christine Mwikali Kilema** was then the Assistant Chief, Muusa sub-location. On 16<sup>th</sup> April, 2005 whilst at home, she received information that the deceased who was the daughter of the accused had passed on in the house. She proceeded to the house and found her burnt body in the kitchen. The kitchen was not burnt though. She called deceased's brother, **Kithongo Mutangili** who confided in her that the deceased used to sleep in the main house and not the kitchen. The deceased had passed on in the night and the accused had carried her to the kitchen and told him to stay away. She noted clothes and some papers at the scene. She then made a report at Mbitini Police Base and Police Officers were dispatched to the scene at about 7.30 p.m.

**Kitongo Mulu,** the headman had in the meantime on 16<sup>th</sup> April, 2005 at about 11 a.m been visited by **Kithongo Mutangili.** He told him that the deceased had cooked porridge and after taking it, burnt herself. He went to the scene and observed that the deceased was lying facing down. She had burns on her back. Her clothes too were burnt. At 12 p.m. he reported the incident to the Assistant Chief, **Christine Mwikali** aforesaid and together they returned to the scene. The Assistant Chief then left him there as she proceeded to report the incident at Mbitini Police Base. The police officers came and he left. By then the accused was not at home.

**Mary Koki,** is a neighbor of the accused, and had employed the accused's wife **Nduta** as a house help. On 16<sup>th</sup> April, 2005 at about 9 a.m she was in her house when a child by the name, **K** came and informed her that, her house help was required by her husband, the accused. At first, **Nduta** was reluctant to go but she persuaded her to do so. **Nduta** wondered aloud though why her husband was calling her to

go to the bush and yet he knew she was working. At about 10 a.m **Nduta** came back with the accused. Initially he was reluctant to enter her compound but after persuasion, he came in and sat down. In the ensuing discussions, the accused told her that the money she had given him earlier had been stolen by the deceased who was his step daughter. He had beaten her as a result and she admitted doing so. Apparently, the deceased had planned on going to Mombasa, hence the reason for taking the money. The accused then asked her for change of Kshs. 200/= and left.

The deceased was a granddaughter to **Mungwee Kasomo**. On 16<sup>th</sup> April, 2009, **Kithongo Mutangili** went to him and told him that the deceased had passed on. He went to the scene and saw the body of the deceased in the kitchen. The deceased was lying face down. On 29<sup>th</sup> April, 2005, he attended the mortuary and identified the body for purposes of postmortem.

The mother of the deceased, **Anne Nduta Kinyambu** confirmed that deceased was her daughter at the time aged 15 years. She was a step daughter to the accused since **Nduta** married the accused in 1994 when she already had the deceased from her previous relationship. They however, had one child with the accused, **M M**. On 16<sup>th</sup> April, 2005, she was away at her place of work when **Musyoka Mutangili** called her and informed her that the deceased had passed on. She immediately left for home accompanied by her employers. She observed that the deceased had burns on her entire back. The accused was not at home though. The police came and took away the body of the deceased at about 6 p.m. The accused came the next day at about 9 p.m and asked whether all the children were at home and denied knowing what had happened to the deceased. She suspected that the accused had sexual relations with the deceased. She had found them in a compromising situation before.

**M M** recalled what happened to the deceased. He was at the time of testifying aged 6 years. He stated that the deceased used to sleep with the accused. On the material day in the morning, the accused poured paraffin on her. The accused had removed paraffin from the home and because she had died in his bed, he used the “*jiko*” and said that she had burnt herself with porridge. He placed her next to the jiko.

The other son of the accused is **J K**. At the time he testified, he was aged 14 years. He recalled that before the deceased passed on, the accused had beaten her 3 days in a row. Otherwise, the deceased used to sleep with the accused in the same bed. On 16<sup>th</sup> April, 2005, the accused called him to bring water to revive the deceased. He did so and the accused poured the cold water on the deceased. When he realized that she was dead, he bought paraffin and burnt her. The jiko was nearby. The accused carried the deceased to where the jiko was, poured paraffin on her, picked a matchbox and lit it, burnt her and left. It was then that he went to call **Ikama** and also his mother, **Nduta**. Later the police came and took the body, away.

**Corporal Gregory Wambua** was then attached to Kitui Police Station. On 16<sup>th</sup> April, 2005, he accompanied the officer in charge crime to the scene where they found the body of the deceased. She was lying face down in the kitchen. She had burns on the back, chest and arms. She also had whip bruises on the lower limbs and neck. The kitchen looked disturbed as clothes and beddings were scattered. There was smell of kerosene and the deceased had pieces of clothing stuck to her burnt skull. **Kithongo** told him that the accused beat the deceased because he had stolen his Kshs. 200/=. He removed the body to Kitui District Hospital Mortuary. On 29<sup>th</sup> April, 2005, a postmortem was conducted on the same in his presence. The accused was not present as he had gone underground. He was nonetheless arrested on 18<sup>th</sup> April, 2005 at 3 p.m when he surrendered at the police station. When he spoke to the accused, he denied knowledge of the death of the deceased.

**Dr Anset Kituku Nzioka** conducted the postmortem on the body of the deceased. He concluded that the cause of death was strangulation leading to asphyxia. 30% degree burns may cause death only depending on the place of burning. The deceased had superficial burns which were unlikely to cause death. He tendered in evidence the postmortem report. This then marked the close of the prosecution case.

The court then directed that submissions on no case to answer be made on 16<sup>th</sup> December, 2009. On that date **Lenaola, J** having read the evidence on record was satisfied that a *prima facie* case had been made out against the accused and placed him on his defence. However, it was not until 30<sup>th</sup> May, 2012, that his

defence was taken. In between, the case had gone through the hands of **Waweru, J** and **Kihara, Kariuki, JJ** but for one reason or another, they could not take the defence.

Since the entire case of the prosecution had been heard by **Lenaola, J** and as an incoming Judge, I am required to comply with the mandatory provisions of sections 200(3) of the Criminal Procedure Code. Having taken the accused though the provision he elected to proceed with the case from where **Lenaola, J** had left. He also opted not to have the witnesses who had previously testified recalled.

In his sworn defence, the accused denied killing the deceased. Instead he stated that on 16<sup>th</sup> April, 2005 he had left his house at about 7 a.m to see his wife's employer. On the way he went past a karubu den where he was joined by the wife. They had drink with friends until 8 a.m when he left with his wife's and headed for the latter's employer. The employer demanded compensation from him for the donkey that his wife had lost. When he refused, the employer gave him Kshs. 1,000/= to visit a witchdoctor who would determine the thief. He proceeded to Mutomo for that purpose where he remained for 2 days. He never got to see the witchdoctor. On Sunday at about 4 p.m he left for home. When he alighted at the local shopping centre, he was informed that something bad had happened in his homestead. He was told that the deceased had in the process of preparing porridge fallen into the fire and was burnt to death. The incident had happened on Saturday when he was away in Mutomo. On getting home, his wife confirmed that the deceased had been preparing tea/porridge when she fell into the fire and was burnt to death. The police had by then taken away the body of the deceased. The following day he proceeded to Kitui Police Station as requested by police. He was interrogated on the incident. He maintained that when it occurred he was in Mutomo. He was asked for a bribe of Kshs. 10,000/= so that he could not be charged for the offence. When he refused, he was charged for the offence after 5 months in custody. That then marked the close of the defence case.

Parties thereafter agreed to file final written submissions. However, as it turned out, only the State filed hers. **Mr. Kimeu**, learned counsel for the accused later resoled from his earlier position informed the court later on 8<sup>th</sup> June, 2012 that he had opted not to file written submissions.

I have carefully read and considered the evidence on record by both the prosecution as well as the defence. I have also considered the submissions on record by the State. There are basic two issues for determination in this case; whether the deceased was murdered, and if so, whether she was murdered by the accused.

Section 203 of the Penal Code defines murder as the causing, by a person or persons with malice aforethought, the death of another person by an unlawful act or omission. From this definition, for an accused to be convicted of murder, the prosecution must prove by cogent evidence and beyond reasonable doubt the 3 ingredients which are;-

§ The death of the deceased and the cause of such death,

§ That the accused committed the unlawful act or omission that resulted in the death of the deceased and,

§ That the accused had the necessary malice aforethought.

Dealing with the first element, there is no doubt at all that the deceased passed on. There is overwhelming evidence from all the witnesses who testified proving that the death of the deceased actually occurred. They saw the deceased body at the scene. Indeed there is even a postmortem report tendered in evidence confirming that fact. Nor has the accused discounted that fact. If anything he confirmed it. According to PW9, the deceased died on 16<sup>th</sup> April, 2005 out of cardio pulmonary arrest secondary to strangulation leading to asphyxia. This is as per the postmortem produced in evidence by PW9. The witness also noted that the body of the deceased had 30% degree burns which were unlikely to have caused death.

Did the accused cause the death of the deceased? The only evidence tending to link the accused to the crime was given by his children, PW6 and PW7. That being the case, their evidence must be approached

with a great deal of circumspection. The evidence was that prior to her death the accused was staying with the deceased and them; as their mother was employed at a nearby home. The accused used to share a bed with the deceased. All they could recall was seeing the accused pour paraffin on and lit the body of the deceased and placing it next to the jiko. The deceased was already dead though. Prior to doing so the accused had asked PW7 for cold water to revive the deceased. He gave the accused cold water which he poured on the deceased but after she failed to respond, he set her ablaze using paraffin next to a jiko. He then left. These children were of tender years. Their evidence must be treated with caution by ensuring that the minimum legal threshold as regards evidence of minors is attained. Of course such evidence requires corroboration. In the circumstances of this case, it cannot be said that the evidence of PW6 corroborated the evidence of PW7. The evidence of PW6 required corroboration just like that of PW7. Evidence that require corroboration cannot be used to corroborate the other. As stated in the case of **Abel Monari Nyanamba & Others vs Republic, Cr. App. No. 89 of 1994 [UR]** by the Court of Appeal, ***“it is trite law and as a general rule that evidence which itself requires corroboration cannot provide corroboration for other evidence which also require corroboration”***.

However, the only corroborative evidence on record is that of the **Christine Mwaikali Kiema, Kitongo Mulu, Anne Nduta Kinyambu, Cpl Gregory Wambua and Dr Anset Kiluru Nzioka**. They all saw burns on the body of the deceased. Indeed even **Cpl Wambua** smelt kerosene at the scene thereby corroborating the evidence of **Musyoka Mutangili** and **John Kithongo** that the deceased had been dosed with paraffin and set ablaze. However, the burns were not the cause of the deceased's death. **Dr Anset** was certain that the burns were unlikely the cause of death. The cause of death was said to be strangulation leading to asphyxia. Did the accused then strangle the deceased? There is no direct evidence linking the accused to such conclusion. The State however thinks that because the accused left the home and disappeared only to re-appear 2 days later following the incident, that conduct was inconsistent with an innocent mind. Secondly, the accused was the only person who could have strangled the deceased since **Musyoka Mutangili** and **J K**, the only other persons living with the accused apart from the deceased were minors and therefore incapable of strangling the deceased. This submission in my view has no legal or factual basis. The deceased was at the time aged 13-15 years, whereas **J K** her immediate follower was aged 12 – 13 years. Whereas **M M** was then aged 6 years. I do not see how these could not have strangled the deceased if they joined forces.

Besides these two witnesses gave varying and different stories to different witnesses who confronted them wanting to know what could have caused the death of the deceased. To the Assistant Chief, **Ko** told her ***“the deceased used to sleep in the main house and not the kitchen. He said that the deceased had died in the night and her father had carried her to the kitchen and told K to stay away...”*** Under cross-examination, the Assistant Chief answered; ***“... I told the police that the deceased poured kerosene on herself and burnt herself. This is what K told me...”*** On the other hand he told **J K M** ***“... that Wanjiku had cooked porridge and then after taking it, she burnt herself...”*** Cross-examined the headman maintained that, ***“...K told me that the deceased had killed herself”***. ***He did not say what she used to do. He said that his father left home that morning at 7.30a.m...”*** To their mother, these witnesses never told her how the deceased had met her death. To **Cpl Gregory Wambua**, however, **K** told him - ***“...that the accused had whipped the deceased because he had taken his Kshs. 200/=...”***

This is a criminal case where the prosecution must prove that the acts or omissions of the accused led to the death of the deceased. There is no evidence on record that the deceased was seen alive last with the accused as purveyed by the prosecution nor is there evidence that the accused retired into bed with the deceased on the material night. The uncorroborated evidence on record is that the accused was seen in the morning carrying the body of the deceased. He tried to revive the deceased by pouring cold water on her. At this juncture, if the accused had been the culprit and intended the death of the deceased, why would he want to keep her alive by undertaking first aid procedures aforesaid on her? Can it then be said that the accused deliberately wanted the accused dead? That is what malice aforethought is all about! Much as the cause of death was said to be strangulation leading to asphyxia, there is no credible evidence that the accused could have been responsible.

The only corroborated evidence linking the accused to the offence is that he was seen carrying the body of the deceased and placing it near a jiko, fetching paraffin and setting it ablaze. However, the doctor

ruled out the possibility of burns being the cause of death. There is no evidence that in burning the body the accused was bent on hiding heinous crime, a theory propounded by the prosecution. There may well be an explanation.

The prosecution has also advanced the theory that by the accused disappearing from the homestead soon after the incident; it was not an innocent action. In criminal cases, a conviction cannot be founded solely on the suspicion, speculation of theories however, plausible they may be. It has been said time without number that, suspicion however, strong, can never justify a conviction in a criminal trial. In this case the prosecution is simply playing on the suspicion theory and or speculation about the accused's subsequent conduct to draw the inference that he was responsible for the crime. I think that the explanation given by the accused in his defence may well be plausible.

It is common ground that on that day, the accused met with his wife and her employer, **Mary Koki**. He is said to have told the employer that he had beaten the deceased for having stolen the money she had given him earlier so that she could travel to Mombasa. The employer then gave her a change of Kshs. 200/= and he left. All this was going on in the presence of the deceased's mother. She never raised finger yet the accused had told her earlier that there was something he wanted to tell her. The accused's wife behavior is simply discontenting. She was not at all concerned about the welfare of the deceased who the accused acknowledged to have beaten. She never bothered to go and check on her. She just went about her business unruffled. Further, when called by her son regarding the death of the deceased, she did not bother to inform the police what her husband had allegedly told her. I think that there is much more than meets the eye regarding the death of the deceased. The accused and his wife were away from the employer's home for about an hour, between 9 a.m and 10 a.m. The accused has stated in his defence that between those hours, they were enjoying with friends local brew of karubu. To my mind, there are far too many loose ends in this case, as to create a doubt in mind as to whether; the accused was really responsible for the death of the deceased. Such doubt like in every criminal case must in the end be resolved in favour of the accused.

Even if the reverse was correct, where was the intention of the accused to kill the deceased? Ordinarily this is what is called *mens rea*. Section 206 of the Penal Code gives instances when such intention, *mens rea* or malice aforethought may be inferred:-

***“Malice aforethought shall be deemed to be established by evidence proving any one or more of the following –***

- 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. knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;***
- c. An intent to commit a felony.***
- d. An intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.***

From the foregoing, it is clear that there are 3 broad elements of malice aforethought. In our case, the prosecution needed to prove that the accused intended expressly or impliedly to cause the death of the deceased. From the record, there is no such direct evidence. Could he have wanted to kill her because she had stolen his Kshs. 200/= or was it because, she was sleeping with him to the discomfort of her mother and or her siblings?

Taking into account all the foregoing and bearing in mind that the burden of proof lies squarely on the prosecution in cases of this nature and the standard being that the prosecution must prove the guilt of the

accused beyond reasonable doubt before the accused is convicted, it is my view and holding that the prosecution has failed to discharge its duty to the standard set by the law. In the premises, I have no other alternative but to acquit the accused of the information. Order accordingly.

**JUDGMENT DATED, SIGNED and DELIVERED at MACHAKOS, this 30TH day of JULY, 2012.**

**ASIKE-MAKHANDIA**  
**JUDGE**