



REPUBLIC OF KENYA

High Court at Nakuru

Murder Case 41 of 2010

REPUBLIC.....PROSECUTOR

VERSUS

JAMES KARIUKI MUNGAI.....ACCUSED

JUDGMENT

By the information dated 30/4/2010, James Kariuki Mungai (the accused) was charged with the offence of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**. He is alleged to have murdered Martha Wangeci Mbugua on 21/4/2010, at Jumatatu Farm in Nakuru North District. He denied committing the offence.

In support of its case the prosecution called a total of nine (9) witnesses and when called upon to enter his defence, the accused testified on oath. The prosecution case as I understand it is as follows:-

Hannah Wanjiku (PW2) is a resident of Kabazi, Jumatatu Farm. She owns a plot where she has constructed nine one-roomed houses, which she rents. One of her tenants was the accused. She told the court that on 21/4/2010, she went to cut grass for her cattle and as she passed by the plot, she heard as if somebody was digging in Kariuki's (accused's) house. At the time there were only two tenants in the plot Njogu and Elimlim (PW3). PW2 spoke to the accused enquiring what the problem was and whether he was sick because he had not left the house since morning. PW1 passed by the plot in the morning and about 1.00 p.m. At about 5.00 p.m., when she asked what he was digging, he asked her if she wanted to see and he opened the door for her. Upon entry she found a heap of soil, there was a panga, jembe and spade. She identified them in court (Exhibit). It is then PW2 called another tenant Njogu but before Njogu could come, the accused excused himself and said he was going to the toilet but he ran away. It is then PW2 screamed and people gathered. One of the people who responded to the screams is PW2's son, PW1, Daniel Njoroge Mwaniki. PW1 was at his home at Jumatatu Farm about 5.00 p.m. on 21/4/2010, when he heard his mother screaming. He went where she was and found her with Jane Elimlim (PW3). PW2 informed PW1 what she had seen in accused's house and PW1 entered accused's house. By then accused was nowhere to be seen. PW1 also saw the panga, jembe, spade, knife and soil scattered in the room, blood on the table and bed. He dug up some of the soil and saw a body in the hole and that is when he ran to report at Kirengero Police Station. The next day, he saw the accused come to the plot with police. He also said that though there were other tenants in the house, they were not present in the plot except Jane Elimlim PW3. PW3 recalled that on 21/4/2010, when at the plot after helping PW2 to put grass on her back, they passed by the plot and heard as if somebody was digging in accused's house. She went away to a funeral and returned about 5.00 p.m. when she found people gathered but accused was not present. Police came and removed the body from accused's house. she did not recognize the deceased person. She denied having seen anybody visit the accused.

PW4, PC Samuel Alman Longoroko was at Bahati Police Station on 22/4/2010 about 6.00 a.m. when accused reported to him that he had murdered his wife in Kirengero area. Police in Kirengero were called to take his away.

PW5, PC Kioko Ngumbao and IP Philemon Sangao (PW8) of Kirengero Police Station received a report from Daniel Mwaniki and Njogu about the murder. They visited the scene at Jumatatu Farm where they found a body buried in one of the rooms. The soil was removed and they found the body parts of a person. The police called the scenes of crime. PW8, PC Kithae Mutunga of scenes of crime who took photographs of the scene. He produced them in evidence as PExh.11. Meanwhile, PW5 and PW8 and their team removed the body parts to the mortuary. PW5 and PW8 also identified the items they found at the scene, shoes, cooking stick, spade, jembe, panga and a blood stained shirt. It is PW5 and PW8 who went to get the accused from Bahati Police Station. PW8 told the court that when they found the accused at Bahati Police Station, he was wearing the shirt/shoes but PW5 said the shirt was in the house. The items were taken to Government analyst (PEx.5 and 12).

PW5 prepared the exhibit memo form and forwarded the items to the Government analyst. He produced them in court as exhibits. PW5 also said that when he first saw the accused, he had a fresh cut wound on the hand. PW5 told the court that Njogu was one of the people who reported the incident but has since died. It is Dr. Titus Ngulungu of Provincial General Hospital, Nakuru who produced the post mortem report that had been conducted by Dr. Omboga who formed the opinion that the cause of death was severe haemorrhage due to the sharp force trauma to the neck, upper and lower limbs attended by vascular injuries (blood vessels). He also produced a mental assessment report prepared by Dr. Onchere in respect of the accused person. The accused was found fit to stand trial. Like PW5, the Doctor noted a cut wound on the anterior aspect of the 4 fingers of the left side. The reports were produced as PEx. 7 & 8 respectively. The Government Analyst, Albert Gachunoi Muriuki (PW7) testified that he received several items for analysis. He received the blood sample of the deceased; 'B', stripped shirt belonging to the suspect 'C', a panga 'D', knife 'E' and a pair of black shoes 'F'. He found that the suspect's shirt was stained with blood of group B. The deceased's blood was found to be Group B. The panga, knife and shoes were all stained with blood group B. He formed the opinion that the blood found on the items belonged to the deceased. He denied having been given the accused's blood sample.

The accused testified on oath in his defence. He admitted that he was living at Kabazi, Jumatatu Farm in a rented house and worked at Ndenai where he used to buy scrap metal. He had rented a house. He recalled that on 21/4/2010, he left Ndenai and arrived at the plot, entered Daniel Mwaniki's (PW1) house where he had left the key to his house. He had been away for 5 months from January 2010. On asking for the key, PW1 said he wanted to cement the house. PW1 told him that he would escort him to the house and show him what he had done. He found a heap of soil. PW1 took a knife, ordered him to sit and when the accused resisted, they got hold of each other, PW1 cut him on the hand and he managed to jump out of the room, ran and reported to the police station that he had been assaulted. He was asked to wait but the police from Kirengero came with a report of a dead person. He denied having known the deceased or that she was his wife. He was beaten up to accept committing the murder but he denied.

The accused does not deny that the room in which the body of the deceased was found was his. He, however, claimed to have been away for 5 months and knew nothing about what happened that the body of the deceased came to be found therein. He is casting the blame on PW1 whom he allegedly left the keys to his house with.

I have no doubt in my mind that the body of the deceased was found buried in the accused's house. There is overwhelming evidence to that effect. PW2 was the first to notice the heap of freshly dug soil. Upon arrival at accused's house, PW1 removed some of the soil and found a dead body. PW3, PW5 and PW9 were present when the body was removed from the said hole. Photographs taken of the scene by PW8 show the gory site. The only question is who committed this heinous act?

Several items were recovered in accused's house including a shirt and shoes. They were found to have been stained with Blood Group B, which was similar to the deceased's. PW1 and PW2 who were first at the scene never made reference to the shirt and shoes. PW5 said that the shirt was in accused's house. To

the contrary, PW9 said the accused was wearing the shirt when he was arrested. The variance in the evidence of the two witnesses was never reconciled. It is not clear where the blood stained shirt and shoes were found and therefore whether they belonged to the accused. In any event, the prosecution did not draw any blood from the accused for analysis. So that it is not possible to tell whether accused's blood was on the shirt and implements found in the house. Accused had injuries on the hand and had his blood been analysed, it may have helped to confirm whether or not the accused's blood was on the shirt, shoes or panga and fork jembe.

The above notwithstanding, PW2 explained how she had heard the accused digging in his house as she passed by the house on that morning, about 9.00 a.m. and 1.00 p.m. and at 5.00 p.m. is when she decided to knock and find out. PW3, too told the court that she heard the noise as if somebody was digging in accused's house when she helped PW2 put grass on her back at about 1.00 p.m. PW2 admittedly talked to the accused before he opened the door for her. PW1 was not even present. I had a chance to see PW2 testify and I believe what she told the court was nothing but the truth. She is the one who raised alarm on seeing the mountain of soil in accused's house. PW1 then removed and saw the body buried under the soil. PW1 testified in this court and at no time did the accused allege what he stated in his defence that he had left his keys with PW1 or that PW1 forced him to sit in the house and they had a scuffle or that PW1 cut him on the hand. Similarly no such questions were put to PW2 who said she was the first at the scene. He must have been injured as he cut up the deceased. His defence is an afterthought and untrue. It does not flow from the prosecution case.

Nobody saw the accused murder the deceased. Infact PW1, PW2, and PW3 did not know who the deceased was. PW3, a resident on the same plot, said that she had never seen accused with a visitor in that plot. However, I am satisfied that PW2 found the accused in his rented house with the body freshly buried in the room. It is upon the accused to explain how the deceased's body came to be in his house, cut up in pieces and buried therein.

Whereas the law is clear that the burden always rests on the prosecution to prove a criminal case beyond any reasonable doubt, and the accused has no duty or burden to establish his own innocence, there are instances when the law places a duty on the accused, to explain certain facts particularly those peculiarly within his own knowledge. **Section 111(1) of the Evidence Act Cap 80 Laws of Kenya** which casts the burden of proof on the accused provides as follows:-

“S.111. (1) When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him:

Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution, whether in cross-examination or otherwise, that such circumstances or facts exist:

Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defence creates a reasonable doubt as to the guilt of the accused person in respect of that offence.”

The accused has failed to offer any reasonable explanation as to how the deceased's body came to be in his house. That raises a rebuttable presumption of fact under **Section 119 of the Evidence Act** that he committed the offence. **Section 119:-**

“The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.”

PW4 told the court that the accused went to report at Bahati Police Station that he had murdered someone in Kirengero. That is how the accused was arrested. PW4's evidence, to whom the accused first reported,

is corroborated by that of PW1, PW2 and PW3 that accused was brought by the police to the plot the next day. He had run away leaving PW2 at the plot on 21/4/2010.

The prosecution did not call the person who witnessed the dead body before post mortem. However, there is indeed evidence that a body was found in accused's house. Photographs of the scene were produced in evidence. The post mortem report indicates that the body was identified by Francis Mbugua and Mary Wangui Muhoro.

Whether malice aforethought was proved;

I am satisfied that it flows from the state in which the deceased's body was found. The cause of death was found to be haemorrhage due to deep cut wound on the neck and chopped limbs. Accused's intention was clear, to kill and conceal the body forever.

Having carefully considered all the evidence on record I come to the conclusion that it is the accused who murdered the deceased and cut up the body into parts and buried them in his house. His defence is a mere denial and untrue and is hereby rejected. I find accused guilty of the offence of murder as charged and convict him accordingly.

DATED and DELIVERED this 23rd day of November, 2012.

R.P.V. WENDOH
JUDGE

PRESENT:

Mr. Marete for the State

Mr. Ochieng holding brief for Mr. Gekonga for the Accused

Kennedy – Court Clerk