



**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**MURDER CASE NO. 79 OF 2007**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**JAMES MBUGUA KARIUKI.....ACCUSED**

**JUDGMENT**

James Mbugua Kariuki is charged with the offence of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**. The particulars of the charge are that on 19/4/07 at Lengenet Village in Nakuru District within Rift Valley Province, he murdered Jane Wanjiru Kairo. The prosecution called a total of 10 witnesses in support of their case while the accused made an unsworn defence and did not call any other witness.

Hannah Wanjiku Kariuki, PW1, testified that she was at Lengenet on 19/4/07 at about 7.00 p.m. She lived near her mother, the deceased, but they lived in separate houses. She told the child Hannah Wanjiku (PW6) who used to stay with the deceased to go to the deceased's house but PW6 informed her that she had seen a fire in the deceased's house. PW1 went to the deceased's house, found the house on fire, saw that her mother (deceased) had been cut and was still in her bedroom. She screamed and neighbours came. They rescued the mother and took her to hospital but she died 2 days later. They suspected the accused to be the culprit as he had earlier threatened them with a panga and even chased them away from the home. The accused is a nephew to PW1. PW1 said that they had spent the day with the accused that day but once the mother was found injured and had been set ablaze, they screamed, the accused disappeared. He was later arrested in Mangu area.

Josephine Njoki Kariuki, PW2, was at home at Lengenet on 19/4/2007 about 8.00 p.m. Her grandmother (deceased) lived about 10 metres away from her house. Her sister, PW6, lived with the deceased. PW6 left the house to go to the deceased's house but returned running and informed PW2 that there was a fire in the deceased's house. PW2 ran to the house, found the house on fire and in the deceased's bedroom, the deceased had been cut on the head and had been set on fire. They rescued her and took her to hospital. Next day, in company of police, they went to accused's house in the same compound where they found a blood stained panga and paraffin. According to PW2, the accused lived in that home but from the 19/4/2007, he disappeared. She gave to the police accused's photograph to help trace him. He was arrested in Mangu area.

PW3, Shadrack Langat, recalled that on 9/9/07, while in Umoja area of Rongai, he was given a photograph of a wanted person by Dickson Chepkwony. He found the accused wearing three pairs of clothes. He met accused, showed him the photograph. He was arrested him and took him to Police Station.

PW4, Dickson Kibet Chepkwony, of Umoja area, Rongai, said that on 9/5/07, he was given a photograph of a wanted person. He spotted the accused at a hotel in the centre and on showing him the photograph he agreed that he was the one.

PW5, Peter Kahiu Kariuki, was informed of his grandmother's death on 26/4/07, and he proceeded to Nakuru where he identified the body before post mortem examination.

PW6, Hannah Wanjiku, a child of 10 years was affirmed and recalled that on 19/4/07, at about 8.00 p.m., she was going to sleep in her grandmother's house when she saw the accused getting out of the grandmother's house. She called him but he did not respond. She saw a fire in the said house and called out her grandmother but she did not respond. She then called her aunt, they entered the house, found the deceased had been cut on the head and was burning.

PW7, PC Noah Komen who is based in Menengai Police Station, recalled that on 23/4/07, members of the public brought the accused to Police Station for alleged murder. He had him transferred to Rongai Police Station where a report had been made.

PW8, PC Ali Sariya received a report of arson on 22/4/07 and after a while they got information that the person who was burned had died. He visited the scene and found goats had been burnt in a house but only the sitting room got burnt and the victim died. He recalled that reports had been made to the Chief about the accused threatening the deceased. The accused disappeared from the home and abandoned his house and was arrested in Mangu area, about 20 kilometres away.

PW9, Jonathan Siele, the Chief of Lengenet Location in Rongai Division knew the accused and the deceased. He recalled that on 5/6/2006, the deceased and the accused's aunts, Hannah Wanjiku, (PW1) Mary Wangari, Sisters to the accused's mother and David Njoroge, a grandchild of the deceased went to his office with the accused and wanted the Chief to witness the signing of an agreement over the land in Orugo Farm. PW9 drew the agreement and the accused agreed to move to the said piece of land in accordance with his deceased grandfather's wishes. He was requested to move immediately but he asked for time till 1/7/06. PW9 produced the agreement as PEx.1. He later learned that the deceased had been murdered.

Dr. Samuel Onchere (PW10) produced the post mortem report prepared by Dr. Kamau whom he had worked with before. The doctor had found the deceased, a 70 year old woman, to have burns on the face, upper neck, both hands and right leg which amounted to 30%. He also found a stitched cut wound on left side of the head 15 cm long, fracture of the skull on the back, left skull and massive haemorrhage in the brain. He concluded that the cause of death was injury due to a cut by a sharp object on the head.

In his unsworn defence, the accused said that he lived with his deceased grandmother from his childhood till 1995. He loved her very much. He left home in 2002 to go to Mangu where he did casual jobs and used to visit home. He left Mangu in February 2007 and went back home. On 18/2/2007, he was at home working in the garden and after lunch he took his bicycle and went back to Mangu. He went for a job with his friend on 19/2/07. He denied any involvement in the deceased's death.

According to post mortem report produced by Dr. Onchere (PW10) the deceased had a stitched cut wound on the left side of the head 15 cm long, fracture of the skull on the back, left skull and massive hemorrhage in the brain. He formed the opinion that the cause of death was injury due to a cut by a sharp object to the head. It seems the burns which were 30% were not as serious as the cut wounds.

Nobody saw the person who inflicted the fatal injuries on the deceased nor did anybody see the one who set her ablaze. There is no direct evidence to connect the accused with the offence. This case therefore turns on circumstantial evidence. For circumstantial evidence to form the basis of a conviction, the court must examine it closely and consider whether it irresistibly points to none else but the guilt of the accused to the exclusion of any other person. There should be no co-existing factors which may weaken or destroy the inference of guilt of the accused person. That is what the court held in **R V. Kipkering Arap Koseke (1949)4 EACA**. PW6, Hannah Wanjiku, a girl aged 10 years who slept with the deceased in same house said that as she was going to the deceased's house, she saw the accused person leave the deceased's

house. She is the one who first noticed the house on fire. She said that accused was armed with a panga but for fear of her life she did not tell anybody that she saw him leave the deceased's house but she informed her aunt and mother that the grandmother's house was on fire. PW6 found the house burning at about 8.00 p.m., the court was not told exactly where PW6 met the accused or whether there was sufficient light for her to see who the person who was leaving her grandmother's house was. However, PW1 and PW2's evidence corroborated PW6's evidence that she was the first to notice the fire and called for help.

PW1, PW2 and PW6 testified that accused was present in the home on that day. The accused also accepted in his defence that indeed he was at the deceased's home that day but left after lunch and went back to Mangu. PW1 said that when they screamed for help the accused mysteriously disappeared. PW2 also said that the accused was living in the home at the time but from the day of the assault on the deceased, the accused disappeared. PW6, saw the accused leave the grandmother's house on that night. I am satisfied that the accused was at the scene where he lived with the grandmother and that he disappeared soon after the attempted arson and assault on the deceased. He had the opportunity to commit the offence.

According to PW1 and PW2, the accused and the deceased had a dispute over land and the accused had even threatened to kill her and chased the deceased and PW1 and PW2 from the home. Both PW1 and PW2 said that they had even reported the matter to the Chief. The Chief PW9, Jonathan Siele said he only witnessed an agreement between the accused and his family members whereby the accused agreed to move from the home to the farm in Orugo in accordance with the grandfather's wishes. PW9 denied adjudicating over any dispute. However, in the agreement that was produced in court, it is indicated that the family went to the Chief after a disagreement. That does support PW1 and PW2's evidence that accused had been threatening them and deceased and the issue had been referred to the authorities.

PW1 and PW2 were clear that the accused person had been disturbing them there before. I believe that is why they had wanted him to leave the home immediately but he asked for time till 1/7/06. However, as late as April 2007 when this incident occurred, he had not yet moved out of the home. I am satisfied that he was in the home when the incident occurred, PW6 saw accused leave the deceased's house when it was ablaze and he disappeared till he was arrested in Mangu, about 20 kilometres away about 4 months later. If the accused loved his grandmother the way he claims he did, he should have been at the home and attended the funeral. From the evidence, I find that the accused had the motive and opportunity to murder the deceased. PW6 saw him leave the deceased's house after setting the house ablaze. The accused's conduct of disappearing from the home till his arrest 4 months later points to his guilt. When arrested, PW3 said the accused had worn three pairs of clothes. It is evidence of a person on the run.

The level of investigations in this case was wanting and I think the police did not take a keen interest in it. I say so because PW2 said that on the next day, i.e. 20/4/2007, police visited the home, went to accused's house and recovered a blood stained panga and paraffin. Although PW8, PC Ali Seriya visited the scene on 22/4/2007, he never alluded to having recovered the murder weapon and paraffin nor did he disclose that any other police officer had visited that scene before him and taken the items. PW1 had learnt that a panga had been recovered in his absence but PW2 claims to have been present. Who took the panga and what happened to it or why was the panga and paraffin not taken to Government Analyst and produced in evidence?

From the evidence on record, it is not clear when the accused was arrested. PW3, one of those who arrested accused talks of 9/9/07 yet by that time, the accused had already been charged with this offence. PW4 who was also helped arrest the accused refers to 9/5/07. The information (court record and) indicates that the accused was arraigned before this court on 23/8/07. It means that he was arrested about 4 months after the incident. I find that accused's conduct of disappearing from home, for over 4 months, on the night that his grandmother was injured does point to him as the culprit. He had the opportunity to commit the offence and it was premeditated because there is evidence that the deceased was first assaulted with a sharp object then the house was set ablaze to conceal the murder. I do not believe the accused's defence that he left the home on the afternoon of the death to go back to Mangu. He ran away because of what he had done. The defence is a mere denial and it is hereby dismissed as such.

I am satisfied beyond any doubt, that the evidence on record does point at the accused as the perpetrator, he had the opportunity, the motive and his conduct does confirm that he committed the offence. He is found guilty as charged and convicted of murder as charged under **Section 322** of the **Criminal Procedure Code**.

**DATED and DELIVERED this 20<sup>th</sup> day of February, 2011.**

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

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**PRESENT:**

Mr. Omari for the State.

Mr. Morara holding brief for Mrs Ndeda for the Accused.

Kennedy – Court Clerk.