



**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT BUNGOMA**

**CRIMINAL CASE NO.49 OF 2008**

**REPUBLIC**

.....

**PROSECUTOR**

**~VRS~**

**JAMES MAINA NJAGI**

.....

**ACCUSED**

**JUDGMENT**

The accused person James Maina Njagi faces a charge of murder contrary to section 203 as read with 204 of the Penal Code. It is alleged that on the 25<sup>th</sup> August 2008, he murdered Beatrice Nyawira Chomba. He pleaded not guilty to the offence.

The prosecution called nine (9) witnesses in this case. The facts are that the accused was the husband of the deceased and both were blessed with a son aged two years at the material time. The accused was conducting business of selling cereals at Webuye town while the deceased worked as loans officer with Kenya Women Finance Trust, Webuye branch. On the material day, the deceased reported to the office and was assigned duties to follow up some clients in Webuye town. She left the office at around 10.00 a.m and passed through her house briefly. She then proceeded to the field to meet the clients. At around 1.30 p.m, the deceased’s body was found in the Pan Paper forest at Webuye after a cold blood murder. The matter was reported to the police who removed the body and commenced investigations. The accused was arrested two days later as a suspect and subsequently charged with murder.

PW1 a security officer at Webuye Pan Paper Ltd was the first to go to the scene after being alerted by casuals working in the forest about the body of the deceased. He found blood-stained clothes of the deceased and a curved knife at the scene which was also blood stained. The exhibits lay near the body. Police visited the scene and observed signs of struggle. PW2 is the brother of the deceased who identified the body to the doctor who performed the post mortem. PW3 the Finance Manager confirms that the deceased reported in the office around 7.30 a.m and left around 10.00 a.m for field work. When PW3 tried to call the deceased later in the day, she could not be reached. It appeared that both her mobile phones were switched off. The witness was later called by a customer and informed of the demise of her colleague. She sent two of her employees to the police station to confirm the incident. PW3 called the accused the same evening and informed him of the death of his wife.

PW4 was the house help of the deceased and the accused at the material time. She testified that the accused left home on the 25/08/2008 around 7.15 a.m. He returned at 11.00 a.m and left shortly thereafter when he came back at 12.00 noon, the accused returned to the house and took a shower. He looked disturbed and did not even take lunch. Earlier in the morning, the accused had complained he was

unwell. He slept from 2.00 p.m to 5.00 p.m. In the evening, the deceased did not return from work as expected. There was an arrangement for the family to have dinner at a friend's house. The accused, his two – year old son and PW4 went for dinner in the evening and returned home later. The mother of the deceased and other close relatives were summoned by police from Kirinyaga District. It was on 26<sup>th</sup> August 2008 that they arrived and recorded statements together with PW4.

The doctor PW5 found deep cuts on the occipital region of the head and the neck. He formed the opinion that the cause of death was cardio-pulmonary arrest due to the severed right carotid artery and the penetrating occipital injury. The mental status report of the accused confirming that he was fit to plead was produced by PW5.

PW6 the Equity Bank Personnel produced the ATM eye images for the two withdrawals made from the account of the deceased on both 25<sup>th</sup> and 27<sup>th</sup> August, 2008. The images showed it was a man who withdrew the money and was wearing a scarf round his neck.

PW7 a police officer from Webuye Police Station visited the scene of crime at Webuye Pan Paper forest. He collected the clothes of the deceased, shoes and a curved knife believed to be the murder weapon. The exhibits were all bloodstained. He called PW8 who took photographs of the scene and of the body at the mortuary. PW8 produced the photographs in evidence.

PW9 the investigating officer worked together with PW7 in the investigations. They arrested the accused person as a suspect on 27/08/2008. In the house of the accused two ATM cards for Co-operative Bank in the name of the deceased were recovered hidden in the ceiling. From the person of the accused, the Equity ATM card used to withdraw money from the account of the deceased was recovered. A hammer was also recovered in the house of the accused.

It is important to note that there was no eyewitness in this case. The prosecution's case is wholly based on circumstantial evidence. The circumstances as contained in the evidence revolve around the conduct of the accused and the withdrawal of money from the account of the deceased. In his defence the accused gave an alibi statement to the effect that he was at his place of cereal business and other times at home on the material day. He also said that he had consent of the deceased to withdraw money from her account on 25<sup>th</sup> August 2008. He added that the funds withdrawn on the 27<sup>th</sup> August 2008 which was done after the death of the deceased was meant to feed mourners including parents who in his house. On cross-examination, the accused said that out of the Ksh.20,000/= he had withdrawn, he had only spent Ksh.3000/= to buy his son a bicycle. The balance of Ksh.17,000/= was still in his possession as he put it. The other possibility is that the balance had been spent in other commitments not disclosed to the court since the accused withdrew a further Ksh.20,000/= two days after the death of the deceased. It was still too early to start funeral arrangements on the 27<sup>th</sup> August, 2008. The accused did not convince the court that he needed the further sum of Ksh.20,000/= to feed the mourners in his house. Neither did he explain exactly what expenses were involved even before the family held any meeting for burial arrangements.

However, circumstances implicating the accused are as follows:

- a) that he withdrew money from the deceased's bank account early in the morning of the material day;**
- b) that he withdrew money from the deceased's account two days after her death without any justification;**
- c) that on the material day, the accused was uneasy and disturbed as he hopped between his home and his place of work;**
- d) that the murder of deceased took place between 11.00 a.m and 1.00 p.m when the accused was out of his home and returned to have a shower at mid-day or thereafter.**

The burden of proof that the circumstances point the guilt to the accused rather than his innocence lies on

the prosecution. It must be proved that the facts justify the drawing of the inference of guilt on part of the accused.

On the issue of the withdrawal of money from the account of the deceased, the prosecution did not probe into the whereabouts of that cash at the time of arrest. The transactions were crucial to this case and further investigations ought to have been carried out. The accused admits withdrawing the money on both occasions. He said that in the first instance, he had the consent of the deceased. On the second instance, the accused said he needed money to feed the mourners. That money was withdrawn in the morning of the day he was arrested. Whether it was spent or not, the investigating officer ought to have inquired into the matter in order to establish the facts surrounding the withdrawals. In the absence of further evidence, the withdrawals may not assist the prosecution's case.

The accused denied he was uneasy and looked disturbed on the material day. He said that he was unwell and had gone to see a doctor that morning and missed him. PW4 the house girl confirmed that the accused was sick about a week before the incident. There are many reasons which could lead to one being uneasy or disturbed and even nervous. The accused was in and out of his house on the material morning. The prosecution did not establish any nexus between the conduct and emotional state of the accused on one hand and the offence.

Blood stained clothes and the murder weapon were recovered at the scene the same day. PW7 also found evidence of struggle at the scene. Forensic evidence would have been ideal to investigate further into the murder. None of that kind of evidence was tendered.

It was held in the case of ***KARIUKI KARANJA –VS- REPUBLIC K.L.R 1986 pg 190*** that ***“an aggregation of separate facts is inconclusive because they are as consistent with innocence as with guilt is not good enough evidence.”*** What I have before me are separate facts that do not add up to any concrete evidence to sustain a conviction. In the same case, the court held that:

***“In order for circumstantial evidence to sustain a conviction, it must point irresistibly to the accused and in order to justify the inference of guilt on such evidence, the inculpatory facts must be incompatible with innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt. The burden of proving facts justifying the drawing of that inference is on the prosecution.”***

I come to a conclusion that an inference of guilt rather than innocence on part of the accused cannot be drawn from the circumstantial evidence adduced in this case. At this juncture I wish to state that the investigations were poorly done. The deceased had two mobile lines according to PW3. No transcripts were obtained from the mobile provider for the relevant period. The offence of murder is a serious one and it ought to be handled with diligence in order to produce better results.

It is my finding that the prosecution have failed to establish the offence of murder against the accused. I therefore acquit him of the charge. He is set at liberty unless otherwise lawfully held.

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**F. N. MUCHEMI**  
**JUDGE**

Judgment dated and delivered on the 28<sup>th</sup> day of September, 2011 in the presence of the accused, the State Counsel Mrs Leting and Ms Nanzushi for the accused.

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**F. N. MUCHEMI**  
**JUDGE**