



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL CASE NO.20 OF 2009

REPUBLIC.....PROSECUTOR

VERSUS

PAUL GATAMA MAINA.....ACCUSED

JUDGMENT

The accused **PAUL GATAMA MAINA**, is charged with the murder of **JANE WAIRIMU GITHII** (the deceased) on 27th February, 2009 at Shamata Village Nyandarua.

According to the deceased person's husband, **David Githii Wambugu (Githii)**, on the 24th February, 2009 at about 3p.m. when he and the deceased returned home they found their house broken into and Kshs.200/=, shoes and a sword stolen. The next day, Githii made a report to the police.

On 27th February, 2001 Githii saw the accused person at Shamatta market wearing his (Githii's) shoes. He alerted the police who went with him to the market where he had seen the accused person. When the accused saw the police, he took to his heels. Later on the same day, as Githii was milking his cows, he heard the deceased scream from the house. As he rushed towards the house, he saw the accused running away holding a blood stained *panga*. He caught up with the accused and held him. The two struggled and in the process Githii sustained cuts on the left thumb and the back. Githii's screams attracted **P.W.2, Simon Ngatia Kabiru (Kabiru)** and some of Githii's tenants. Githii discovered that the deceased had been killed.

Kabiru for his part recalled that on the day in question, he responded to Githii's screams and found him struggling with the accused person over a sword. He joined Githii and they disarmed the accused and took him to the police station. Also attracted by the screams was **P.W.3 Muthomi Kimathi**. He too found the accused and Githii struggling over a sword. Upon entering Githii's house he found the deceased dead. He took the sword which he handed to the police.

The accused was rearrested by **P.C. Julius Kirui**. The body of the deceased was examined by Dr. Ngenya who had been transferred to Maragua at the time of the trial. On his behalf, **Dr. Linet Karanja** produced the post mortem report.

According to the report, the deceased suffered multiple cuts on head, neck, chest and shoulder. On internal examination, the doctor noted a stab wound penetrating through the left lung. According to the doctor, death was caused by cardio pulmonary arrest secondary to stab wound.

In his unsworn defence, the accused explained that he was employed by the father of the deceased as a herdsbody. On the day in question, the deceased sent him to take some money to a certain lady. On his

way back from this errand he met Githii who had not paid him his salary for two months. Githii paid him Kshs.500/=. He observed that Githii was drunk. After being paid Kshs.500/=:, the accused went to the market. While at the market, a police officer called him but instead he ran away and returned to Githii's home.

At Githii's home, he heard Githii and the deceased quarelling; that the deceased was telling Githii to go to his prostitutes. The accused heard the deceased screaming and on rushing to the scene he found she had been stabbed. Githii on seeing the accused also cut him on the left hand and the leg. Githii chased him intending to cut him again but. **P.W.3, Ayub Muthomi Kimathi** and other neighbours intervened. Both the accused person and Githii were arrested. The accused was taken to the hospital. After one week, Githii was released and the accused person charged with this offence.

Learned counsel for the accused correctly submitted that there was no direct evidence linking the accused with the murder of the deceased; that the accused was only a suspect; that even circumstantial evidence did not link the accused person to the death of the deceased; that the accused has offered a plausible defence.

I have considered the evidence presented by both the prosecution witnesses and the defence. It is proved by medical evidence that the deceased died from multiple cuts on the head, neck, chest and shoulder. It is also common ground that there was no direct evidence as to who inflicted those injuries; further it is not in dispute that the accused was at the scene at the time the deceased was attacked.

The prosecution case is based on circumstantial evidence. That evidence is to the effect that the accused person had been suspected of stealing from Githii's house; that he was seen wearing Githii's shoes; that Githii saw him emerge from the house after the deceased screamed; that he was armed with a blood stained sword and; that the same sword was identified to be that which had been stolen from Githii's house.

It is now settled law that a conviction can be based on circumstantial evidence. However, before a conviction based on circumstantial evidence can be entered, the court must be satisfied that the evidence relied upon points irresistibly to the guilt of the suspect; and that there was no co-existing factors that would weaken or destroy the inference of the suspect's guilt.

See **Republic V. Kipkering Arap Koske & Another** (1949) 1 EACA 135 and **Simeon Musoke V. Republic** (1958) EA 715. Has the prosecution discharged the burden of proving that the circumstances enumerated above irresistibly point to the guilt of the accused person to the exclusion of any other person?

There is evidence that when Githii discovered the theft of his money, shoes and sword on 24th February, 2009, he made a report to the police. On the fateful day, he saw the accused wearing shoes which he believed were his. He once again informed the police. According to him, the accused fled on seeing the police. That evening while he was outside the house milking his cows, he heard the deceased scream. As he responded, he met the accused running away holding a blood stained knife. He held the accused with whom he struggled until the intervention of the neighbours.

From the foregoing and in view of the evidence of independent witnesses and the fact that there were no other persons in Githii's home at the time of the attack, I find that there is overwhelming circumstantial evidence against the accused person. His defence is displaced. There was no independent evidence that the deceased and Githii had disagreed or that Githii was drunk. The defence is a clever narration intended to shift the blame to Githii. The injuries sustained by the accused, I find, were caused during the struggle with Githii to disarm him. Having been discovered to be the person who had broken into and stolen from Githii's house, the accused set out to revenge. He had the opportunity and came prepared to cause death of the deceased. I find no co-existing factor or circumstance to weaken the prosecution evidence against the accused person

I find the accused person guilty of the offence of **murder** contrary to **section 203** as read with **section**

204 of the **Penal Code**. He is accordingly convicted.

Dated, Signed and Delivered at Nakuru this 28th October, 2011.

W. OUKO
JUDGE