



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CRIMINAL CASE NO. 37 OF 2007

REPUBLIC.....PROSECUTOR

VERSUS

SIMON WACHIRA MUTHIKE.....ACCUSED

JUDGMENT

Simon Wachira Muthike, the accused person herein, is before this Court on the information of the Attorney General dated 23rd August 2007 to face a charge of murder contrary to *Section 203* as read with *Section 204* of the Penal Code. The particulars of the offence are that on 23rd July 2007 at Ciagini Village of Kirinyaga District within Central Province, the accused murdered Alice Njeri Muciri.

The prosecution's case is supported by the evidence of twelve (12) witnesses. It is the evidence of **Ann Wanjiku Kinyua** (P.W.5), that her sister, the late Alice Njeri Muciri, visited her home on 23rd July 2007 at about 9.00 p.m. Shortly, the deceased's husband, Simon Wachira Muthike (accused), arrived in the home of P.W.5. Ann Wanjiku Kinyua stated that she knew the deceased and the accused had matrimonial differences. She told this Court that the accused requested her to talk to the deceased so that she may return to their matrimonial home. P.W. 5 talked to the deceased who told her that she was ready to resolve their dispute only if the accused visited their parents to discuss the issue. P.W. 5 said that, it would appear the accused wanted the deceased immediately return home without the dispute being referred to their parents. At 9.30 p.m., Ann Kinyua said that the late Alice Njeri Muciri left her home for her parents' home. P.W. 5 stated that the accused closely followed the deceased. P.W. 5 said, she was later informed by her brother, Peter Karega (P.W.6), that the accused had assaulted the deceased that night outside their

parents' gate. **Fausto Muchira Kabiru** (P.W.1), told this Court that on the night of 23rd July 2007 he was at home with his wife, Jane Njoki (P.W.2) when at 10.00 p.m. he heard screams outside their gate. P.W. 1 said he heard the deceased alleged that her husband, the accused, wanted to kill her. By then, P.W. 1 said, the deceased and the accused were separated. P.W. 1 rushed out of the house where he met the deceased outside their gate. He claimed the deceased was being pursued by the accused. P.W. 1 alleged that he saw the accused stab the deceased on the throat, chest and cheek with a knife. The accused was said to have also had a panga with him. P.W. 1 said the deceased fell down on his feet while the accused sat on her. P.W. 1 and P.W. 2 managed to push off the accused and in the process it is alleged P.W. 2's fingers were cut by the accused using his panga. The commotion is said to have attracted the neighbourhood who responded to the distress calls by rushing to the scene. The accused is said to have disengaged himself and fled with the knife to his house leaving behind the panga. P.W. 1 said he took the deceased to Wanguru Police Station where they were referred to Kimbimbi sub-District Hospital but unfortunately the deceased passed on while on her way to hospital. P.W. 1 said he was able to see what was happening that night with the assistance of a bright moonlight. Jane Njoki (P.W. 2) gave a near similar story as that given by P.W. 1. P.W. 2 was able to show this Court the injuries she sustained on her fingers during the encounter with the accused, her son-in-law. P.W. 2 said she heard the deceased scream while hitting the gate as she sought for help on the fateful night. **Francis Njogu Mutugi** (P.W.3) a neighbour of P.W. 1 and P.W.2, stated that he rushed to his neighbour's gate when he heard the screams. P.W. 3 found P.W.1, P.W.2 and Peter Karega (P.W. 6) outside their gate trying to disarm the accused. P.W. 3 intervened and managed to disengage the accused who in turn got an opportunity to run away. **Patrick Gachoki Mucira** (P.W.7) a village elder, said that he with the assistance of the youth visited the accused's house at Thome Village where they arrested him. He was later re-arrested by the Police from Wanguru Police Station. Cpl. Julius Mutune (P.W. 12) stated that he was the duty officer on 23rd July 2007 at Wanguru Police Station when at 11.40 p.m. the deceased was brought to the Station to report about an assault. P.W. 12 said he offered the family a Police motor vehicle to take the deceased to hospital for treatment. P.W. 12 said he took possession of a knife presented to Karaba Police Post by the accused in the fateful night. P.W. 12 further took possession of the panga surrendered by P.W. 1. P.W. 12 produced the knife and the panga as exhibits in evidence. **Dr. Paul Mbalu** (P.W. 8) produced the postmortem report done on the body of the deceased. P.W. 8 noted the following injuries on the deceased's body:

- Stab cut on the left scapula area penetrating into the chest cavity measuring 3 cm long.
- Stab cut on the left cheek measuring 2 cm long and 4 cm deep.
- Laceration on the right frontal face measuring 8 cm long and 2 cm diameter.
- Puncture on the upper lung lobe, left chest wall.
- Haemothorax 3 litres.

P.W. 8 formed the opinion that the cause of death was acute internal haemorrhage (Haemothorax) due to stab wounds. Dr. Owino (P.W.4) produced as an exhibit in evidence, a psychiatric report indicating that the accused was of sound mind.

When placed on his defence, the accused gave sworn testimony. He told this Court that he had a domestic quarrel with his wife (deceased). The accused said that on the night of 23rd July 2007 he and the deceased visited the home of Ann Wanjiku Kinyua (P.W. 5), his sister-in-law with the intention of requesting her to arbitrate over their domestic dispute. The accused said that the deceased was adamant that she can only reconcile with him after he had met with her parents. It is the evidence of the accused that the deceased requested him to escort her to her parents' home that night because it was dark and late. The accused said

he escorted the deceased to the gate of their parents and that when he made his way to go back, the deceased's brother called 'Kariuki' confronted him by questioning his presence in that homestead. A fight is said to have ensued. The accused said the deceased summoned her parents who came with sticks which they used to assault him. It is alleged that the accused's brother-in-law rushed to his house and came back with a weapon which he attempted to cut him. The accused said the weapon landed on the deceased when he ducked the weapon. The accused said he managed to escape when P.W. 3 arrived to disengage him. He said he went to his house but the Police arrived and had him arrested. The accused said he reported the case of assault to Karaba Police Post. He denied ever murdering his wife.

At the close of evidence, learned counsels from both sides were invited to make submissions. I have considered the evidence plus those submissions. In order to establish the offence of murder, two ingredients must be proved: First, the element of malice aforethought and secondly, the element of *actus reus*.

Let me determine whether or not any of those ingredients have been established in this case. It is the submission of Mr. Wahinya, learned advocate for the accused, that the element of malice aforethought was not established on the part of the accused. It is not in dispute that the accused and the deceased were wife and husband. It is not also in dispute that the duo had a matrimonial quarrel which made the deceased desert the matrimonial home. The evidence of P.W. 5, P.W.2, P.W.1 and P.W. 6 squarely put the accused at the scene of crime. The accused in his defence does not deny that he was with the deceased that night at the scene of crime. It is not clear from the evidence of the witnesses whether the accused had malice aforethought. Perhaps the evidence which pins down the accused as having had malice aforethought is the nature of injuries the deceased suffered. It is obvious from the injuries noted in the postmortem report that whoever inflicted those injuries intended to either cause death or do grievous harm to the deceased. This in itself establishes the element of malice aforethought under Section 206 (a) of the Penal Code. In my estimation I am convinced the ingredient of malice aforethought was established in this case.

The next question is who inflicted those injuries. I have already stated that the accused was placed at the scene of crime. The evidence of P.W.1 is clear that the accused was armed with a panga and a knife. He was seen by P.W.1 with the assistance of a bright moon light stab the deceased using the knife. The accused in his defence has alleged that the injuries were inflicted by one of the deceased's brothers called 'Kariuki'. I am unable to believe the accused's defence for two reasons:

First, the accused was unable to state the full names of his brother-in-law. He merely stated that he was called Kariuki. He did not seek the assistance of this Court to summon him to court to testify. Secondly, even if it was true that the deceased's injuries were inflicted by her brother, then the sort of injuries stated in the post mortem report is not consistent with a single blow or cut by a panga. I find the accused's defence to be a make up story. In the end, I find the two ingredients for the offence of murder to have been established. The accused is convicted as charged.

The learned State Counsel is called upon to outline the previous criminal record of the accused after which the accused and his legal advisers are called upon to mitigate before sentence.

Dated and delivered at Nyeri this 6th day of October 2011.

J. K. SERGON
JUDGE

In open Court in the presence of Miss Mwai holding brief Wahinya for the Accused and Miss Maundu for the State.

Court: The case is adjourned to 12th October 2011 for sentence.