



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**HCCR. NO. 76 OF 2006**

**LESIIT J.**

**REPUBLIC..... PROSECTOR**

**VERSUS**

**JOHN MUTUMA GATOBU.....ACCUSED**

**J U D G M E N T**

The accused is charged with two counts of murder contrary to section 203 as read with section 204 of the penal Code. In count 1 the particulars of the offender are that on the 10<sup>th</sup> day of November 2007, at Gikuune Sub-Location, Kabaranyaki Location in Meru Central District within Eastern Province murdered Faith Kiende Mutuma.

In count 2 the particulars of the offence are that on the 10<sup>th</sup> day of November, 2007, at Gikuune Sub-Location Kabaranyaki Location in Meru Central District within Eastern Province murdered Makena Mutuma.

The prosecution called five witnesses. PW1 was Dr. Nguyo who produced post mortem reports of the examinations carried out on the bodies of the deceased by Doctor Macharia on the 12<sup>th</sup> November, 2007. The reports show that the deceased Faith Kiende Mutuma was 25 years old. She had a grossly swollen face multiple lacerations on the neck and anterior chest wall, with fractures on level C3 and C4 of the cervical spine with damaged spinal cord at same level. The cause of death was cardio pulmonary arrest due to head and cervical spine injuries.

The second body was of Makena Mutuma, a one month old baby. She had scalp haematoma on the right temporal region with intracerebral haematoma on the same side. The cause of death was cardio pulmonary arrest due to head injuries caused by a blunt object.

PW2 was Joseph Mwirigi a neighbour of the accused. His testimony was that he was woken up by screams of a woman at 12.30 am on 10<sup>th</sup> November, 2007. Joseph testified that he was able to know that the screams were coming from the accused house. He proceeded there and when he called the accused, the accused did not answer. He walked over to Stanley's house, PW3 and the father of the accused. Both of them went back to the house of the accused. The accused did not respond to PW2's calls. He however responded when his father called him. PW2 and 3 went to the house of the Sub-Area PW4. On their way back to the house of the accused, they met him also going to the Sub-Area's house. According

to PW2, the accused reported that he was going to see him, i.e. Sub-Area because he had “**finished his work**”. They then walked back to the house of the accused and the accused opened the house for them with a key. Inside they found the two bodies of the deceased in this case. When the bodies were discovered, the Sub-Area PW4 and the father of the accused PW3 took the accused to the Area Assistant Chief Wilson Mutuma PW5 to whom they reported the matter. PW5 arrested the accused person and called the police.

The accused gave a sworn defence. He did not call any witness. His defence was that on the material night he proceeded home after work where he arrived at 8.30 pm. He said that he bathed and then eat his supper. He said that he received a call from a friend ,Patrick Gitonga who asked him to go to his place because he had some work for him. The accused stated that he proceeded there and he sat down to talk to his friend, whose home was about 1 kilometer from his house. He said that they agreed with Gitonga how he would dig a pit latrine for him at his place. He said that after some time, Gitonga escorted him a distance of about 200 meters. He said that before he arrived at his home he met his neighbor PW2 and his father PW3. He said that he did not talk to them. He said that he proceeded to his house where he found the door open. He said that he flushed his torch and entered the house. He said that his wife was dead on a chair and his daughter’s body on the floor. He said that he ran out of the house intending to call the Sub-Area PW4. The accused stated that he met Sub-Area on the way with his father and his neighbor PW2.

I have considered the evidence adduced by the prosecution and the defence in this case. I have also considered the submissions by Mr. Njenyire for the accused and Mr. Kimathi for the State at the stage of no case to answer, and Mr. Mungai for the State after the close of the defence case.

The accused is charged with murder. The prosecution has to adduce evidence to prove that the accused person and no one else inflicted the injuries on his wife and daughter as a result of which injuries the two died.

Section 203 of the Penal Code stipulates

**“S.203 Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder”**

The prosecution must show that the accused person had formed the necessary intention to commit the said offences, or in other words that he had malice aforethought. What constitutes Malice aforethought is clearly set out under section 206 of the Penal Code in the following terms:

**“206. Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances –**

**(a) An intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;**

**(b) Knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused.”**

There was no eye witness to the incident. The prosecution is relying on the fact that PW2 an immediate neighbor of the accused heard screams inside the accused house, and that eventually he and the father of the accused PW3 heard the accused talking inside the house after the screams had subsidized. The prosecution is relying on circumstantial evidence.

In the case of **Sawe –V- Rep [2003] KLR 354**. the Court of Appeal held as follows:

**“1. In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other**

reasonable hypotheses than that of his guilt.

2. Circumstantial evidence can be a basis of a conviction only if there is no other existing circumstances weakening the chain of circumstances relied on.

3. The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution. This burden always remains with the prosecution and never shifts to the accused.

4. ...

5. ...

6. ...

7. Suspicion, however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt.”

In the case of ABANGA alias ONYANGO V. REP CR. A NO. 32 of 1990(UR) the Court of Appeal stated:

“It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests:

(i) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established,

(ii) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;

(iii) the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.”

The prosecution has adduced evidence to show that the accused was inside the house when his wife was heard screaming by PW2. The accused remained inside the house as PW2 went to call PW3. When PW3 called the accused, he muttered something inside the house.

The prosecution has proved that the accused was in his house from the time his wife started screaming to the time she stopped screaming. Soon thereafter she was found dead together with her month old baby. The prosecution has cogently established that the accused was the last person with the deceased when she was heard screaming, just before her body was found. From the circumstances of the case, there no chance that any other person went to the accused house at the material time and committed the offences.

I did consider the evidence of PW2 that when the accused saw PW4 the Sub-Area he told him that he was looking for him to report that he had “finished his work”. PW4 said that accused told him he wanted him to go and see what he had done. I find that the conduct of the accused before PW2, 3 and 4 on the material night was that of a man with a guilty conscious.

The accused put up an alibi as his defence In the case of UGANDA v. SEBYALA & OTHERS [1969] EA 204, the learned Judge quoted a statement by his lordship the Chief Justice of Tanzania in Criminal Appeal No. 12D 68 of 1969 where his lordship observed:

“The accused does not have to establish that his alibi is reasonably true. All he has to do is to create doubt as to the strength of the case for the prosecution. When the prosecution case is thin an alibi which is not particularly strong may very well raise doubts.”

The accused alibi defence has not raised any doubt in the mind of the court regard the prosecution evidence against him. The accused must have attacked his wife on the material night. Her screams were heard by PW2 who was disturbed enough to wake up and leave his house to check on the noises soon after he heard them. The accused was heard inside the house soon after the voices subsided. His defence that he was not at home at the time of this incident are proven to be a lie beyond any reasonable doubt.

Having carefully considered the entire evidence adduced in this case. I find that the prosecution has established the case against the accused beyond any reasonable doubt. I find the accused guilty of murder in both counts as charged and convict him accordingly.

**DATED, SIGNED AND DELIVERED THIS 3<sup>RD</sup> DAY OF NOVEMBER, 2011**

**LESIIT, J  
JUDGE.**