



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Criminal Case 62 of 2008

**REPUBLIC.....PROSECUTOR
VERSUS
JOHN NDIINGURI MBUGUA..... ACCUSED**

JUDGMENT

The accused, **JOHN NDIINGURI MBUGUA**, is charged with the offence of **murder contrary section 203 as read with section 204 of the Penal Code**. It is the prosecution case that on the night of 30th June, 2008, at Githurai 45 Estate, within the Nairobi area, the accused murdered **FRIDAH MAKANDI MWONGELA**.

The prosecution called a total of 18 witnesses, whilst the defence called only one witness, the accused.

To a large extent, the circumstances surrounding the death of Fridah Makandi Mwangera ("the deceased") are not contentious. **PW 14, DR. FRANCIS MAINA NDIANGUI**, testified that the cause of death was a stab wound which penetrated the deceased's chest cavity, causing a laceration to her heart.

During post mortem, **PW 14** noted that the body of the deceased had only one stab wound, and the same was on the left part of her chest.

The said injury was sustained by the deceased, when she was inside **PW 2** house, where she and other persons had gone, in response to information that **PW 2** was being killed inside her house.

The accused did confirm that on the night of 30th June 2008, he did have a quarrel with **PW 2**. According to the accused, he was the husband to **PW 2**. However, **PW 2** described the accused as a friend, although she also said that the two of them had lived as a man and wife, for three years.

PW 1, MERCY WANJIRU NGUGI, was a neighbour to **PW 2**. On the night of 30th June 2008, (which will hereinafter be cited as "the material night"), **PW 1** met **PW 2's** three children outside their house. As it was about 9.00p.m., **PW 1** inquired from the children why they were outside. The Children told her that their mother was being beaten by an Uncle.

PW 1 had gone outside with a view to visiting the toilet. When she had done the needful, and was returning to her house, **PW 1** heard a man demanding his documents. The voice was from inside **PW 2's** house.

According to **PW 1**, she also heard cries from **PW 2's** house. And, during cross-examination, **PW 1** said that the man who was demanding his documents was the accused herein.

When **PW 1** heard **PW 2** say;

"Don't Kill Me", she rushed to get help from **PW 3** and the deceased.

It was the evidence of **PW 1** that the deceased and **PW 3** rushed ahead of her, and entered **PW 2's** house. Meanwhile, **PW 1** returned to her house.

But shortly thereafter, **PW 1** heard the deceased saying;

"Kwani ni deni gani nikulipe?"

She then heard the loud cries of one person. **PW 1** immediately got out of her house

again. And **PW 3** requested her to help in getting a taxi. **PW 1** obliged, and the taxi later ferried the deceased from the scene, to hospital.

PW 2, SUSAN MWIKALI WANYOIKE testified she used to work as a conductor on “Elshadai Bus Service”, which operated buses on “Route 45”

On the material day, she worked until 7.00p.m. She arrived at her house at about 7.30p.m., and fed her three children.

It was her evidence that at about 8.00p.m., the accused arrived at the plot where she resided, but he first went into the house of Wairimu, a neighbour.

When **PW 2** was already half asleep, the accused knocked on her door. As she did not open the door immediately, the accused threatened to bring it down. **PW 2** therefore opened the door and the accused entered the house.

The accused demanded from **PW 2**, his documents, wallet and mobile phone. The documents included an Identity Card and a Driving Licence. Those two items were inside the wallet.

The accused also demanded the return of some money which he had given to **PW 2**. According to the accused, he had given to **PW 2**, the sum of KShs.1,200/-. But **PW 2** insisted that it was only KShs. 400/-.

PW 2 told the accused that she did not have any of the items which the accused was demanding for, as she had given the same to her brother, who was to deliver them to the accused earlier that day.

The accused beat up **PW 2**, threatening to kill her if she did not give him the various items. When **PW 2** saw that the accused had a knife, she shouted. It is at that stage that **PW 2's** three children went outside the house.

Shortly thereafter, **PW 3, PW 4** and the deceased arrived at **PW 2's** house. When the deceased slapped the accused, the latter responded by saying;

“I don't get beaten by a woman.”

At that stage, **PW 2** saw the accused draw the knife which he had been holding, and he used it to stab the deceased. The deceased fell down, and the accused ran away.

However, the accused was caught by members of the public, who beat him up.

Later, **PW 2** picked up the knife which the accused had used to stab the deceased. The knife was recovered by **PW 2** at the place where the accused had been beaten up.

It was **PW 2's** testimony that the whole incident took place in darkness, as there was no light inside the house.

PW 3, VERONICA MUTHONI MBUTHIA, was an older sister to **PW 2**.

On the material night, at about 9.00p.m., she was still at the market place, where she used to sell fruits, in Githurai.

PW 3 confirmed that **PW 1** rushed to the market place and told them that **PW 2** was being killed inside her house.

When **PW 3** rushed there, together with the deceased and **PW 4**, they found the house in darkness. **PW 3** saw the accused seated on a chair, whilst **PW 2** was kneeling, as if holding the accused.

PW 3 asked what was going on, but there was no answer. Then the deceased offered to pay the debt, if any.

According to **PW 3**, the accused told the deceased that he was not used to being answered by a woman.

When the deceased slapped the accused, **PW 3** then heard that the deceased had been stabbed. And when **PW 3** saw the deceased bleeding, she rushed out and sought **PW 1's** help in getting a taxi.

PW 3 escorted the deceased to St. John's Hospital, where the doctor pronounced her dead.

And by the time **PW 3** reached the Chief's Camp, the accused was already under arrest.

During cross-examination, **PW 3** said that although there was no light inside or outside the house, there was moonlight, and the door was open. It was that natural light that enabled **PW 3** to see **PW 2** kneeling inside the house.

PW 4, CHRISTOPHER MURIUKI MBUTHIA, was a brother to **PW 3**.

On the material night, he too was at the market place, in Githurai, where he sold carrots.

PW 4 saw **PW 1** arrive at the market place, screaming, saying that the deceased was being beaten in her house. The deceased was also a sister to **PW 4**.

He therefore rushed to her house, together with **PW 3** and the deceased. **PW 4** was the first person to enter **PW 2's** house, which was in darkness. **PW 4** found **PW 2** kneeling, whilst crying.

PW 4 said that the door was open and thus some light from outside was entering into the house. **PW 4** was thus able to see the accused where the latter was seated on a chair.

When the deceased asked the accused what was happening, **PW 4** saw the accused push the deceased outside the house.

PW 4 then held onto the accused, telling him not to fight.

Meanwhile, as both the deceased and **PW 3** had been standing closer to the door than **PW 4**, the two ladies both landed outside the house, when the accused pushed the deceased.

PW 4 then heard **PW 3** screaming. **PW 3** was saying that the deceased was dying. At that point, **PW 4** thought that the deceased had perhaps fainted. He therefore lifted up her head, to find out if she might have hit her head against something; but **PW 4** saw no injury on the head. However, some blood spurted onto him, causing **PW 4** to lose consciousness briefly.

Later, **PW 4** was one of those who escorted the deceased to hospital, where she was pronounced dead. Later still, **PW 4** found the accused already under arrest.

When asked questions during cross-examination, **PW 4** emphasized that when the accused pushed out the deceased, he was not blocking any blows from the deceased.

PW 5, FRANCIS WAIRIA GICHUHI, also used to sell fruits within the Githurai area. He was at his place of business when **PW 1** arrived there, seeking assistance. **PW 5** saw **PW 3**, **PW 4** and the deceased rush off to **PW 2's** house.

PW 5 did not follow them. But a little while later, he saw **PW 1** coming back towards him saying that **PW 5** should get a taxi, because the deceased had been stabbed with a knife. It is **PW 5** who got the taxi which then ferried the deceased to St. John's Hospital.

PW 6, DAVID KING'ORI MUBURIAH, was at a club, when he heard screams, at about 9.00p.m., on 30th June 2008.

He got out of the club and learnt that someone had been stabbed with a knife. Before he could go to the scene, a vehicle arrived, ferrying the victim.

When he identified her, **PW 6** went to inform her husband, who was then at a club which he used to frequent.

PW 7, MICHAEL MUTISYA MBUTHIA, is the husband to the deceased. They had been married for 10 years.

On the material night, he was at "Cool Beehive" pub, where he was attending a funeral gathering. They were making arrangements for a funeral.

It is then that **PW 6** arrived, and told him that his wife had been injured with a knife. **PW 6** told him that the victim had been rushed to St. John's Hospital. **PW 7** therefore rushed to the hospital, but he found that his wife was already dead.

Later, when he saw the accused, already under arrest, at the Chief's Camp, **PW 7** noted that the accused used to be a customer of his, at his fruits' business.

PW 7 used to be assisted by his wife, in the said business. And **PW 7** had seen the accused in the company of **PW 2**, when the two would come to his place of business, to buy fruits.

But **PW 7** did not notice any bad blood between the accused and the deceased, at the market.

PW 8, ONESMUS JOHN BOSCO KARUGU, identified the body of the deceased, at the City Mortuary, for purposes of post mortem.

PW 9, NO. 200100925 APC FRANCIS KING'ORI, was an Administration Police Officer attached to the AP Camp, Githurai 45, at the material time.

At about 9.30p.m. on 30th June 2008, he was at the camp when a crowd of about 10 people arrived. He and his colleagues stopped the crowd at the gate.

PW 9 noticed that one person in the crowd had injuries on his face.

PW 9 then noticed a lady, who identified herself as the wife to the injured person. When he inquired from that lady what had happened, she told him that her husband had stabbed the wife of somebody else. The lady then produced the knife which had been used in the stabbing.

PW 9 then contacted **PW 10** by phone. **PW 10**, who was on patrol duties rushed back to the camp and escorted the accused to Githurai Kimbo Police Station. **PW 9** also gave to **PW 10** the knife which he had been given by the lady.

And, **PW 9** said that the knife was bloody.

PW 10, AP CPL. WILSON TELEU NTAIYA, corroborated the evidence of **PW 9**.

PW 11, CHIEF INSPECTOR MOHAMED AMIN, was the O.C.S. Githuria Kimbo Police Station, as at 30th June 2008. He said that he got a report at about 8.00p.m, regarding an incident in which someone had killed the sister-in-law to the accused.

PW 11's sole duty in that matter was to notify the Duty-Officer, Cpl. Kaaiya; and also the

Nairobi Area Control Room, who were to deploy the personnel from the Scenes-of-Crime department.

PW 12, NO. 88498, PC ROBERT WANYONYI, was the first police officer to whom the report was made. He received the report from **PW 3** and **PW 4**, after the victim had been pronounced dead by the doctor to whom they had earlier rushed her.

PW 12 said that **PW 3** and **PW 4** had first gone to the Chief's Camp, from where they were referred to the police station.

PW 12 also confirmed that the accused was escorted to the police station by two Administrative Police Officers, from the Chief's Camp. The two officers handed over to **PW 12** the knife that had been allegedly used to commit the murder.

PW 13, NO. 76877 PC PETER OMOLO was an officer attached to the Scenes-of-Crime Department of the Nairobi Area C.I.D. Headquarters.

On 1st July 2008, at about 12.30 a.m., he was at the Githurai Kimbo Police Station, where he took photos of the body of the deceased: That was before the body was taken to the City Mortuary.

Then on 9th July 2008, **PW 13** took photos of the body, at the City Mortuary. The photos were produced as exhibits during this trial.

PW 13 also took photos at the scene of crime, and he produced them in evidence.

PW 14, DR. FRANCIS MAINA NDIANGUI, is a pathologist.

On 9th July, 2008, he conducted a post mortem examination on the body of the deceased, at the City Mortuary. He found one injury on the left part of her chest. It was a stab wound, which had penetrated into the chest cavity, causing a laceration to the heart. The chest cavity had a litre of blood.

He formed the considered opinion that the cause of death was bleeding caused by the laceration to the heart, secondary to a stab wound.

PW 14 did provide a sample of blood from the deceased, which was to be analysed by the Government Chemist.

PW 15, DR. ZEPHANIA KAMAU, assessed the mental status of the accused, and found him to be of sound mind.

He also noted that the accused had injuries to his face, chest, wrist and ankle.

In his assessment, those injuries were caused by a blunt object.

PW 16, IP DAVID MULI, is the person who recorded the witness statements. He also took the knife and the blood sample to the Government Chemist.

PW 16 was the Investigating Officer in this case.

His investigations revealed that there had been a commotion between the accused and the deceased, which culminated in the deceased being stabbed to death.

By way of clarification, **PW 16** said that the accused and **PW 2** had an argument. Then the deceased and other persons arrived at the scene of that argument, to find out why the accused was beating up **PW 2**. Thereafter, there was a commotion, leading to the death of the deceased.

PW 17, STEPHEN ATINDE JOEL WAIBE is a Government Analyst, attached to the Government Chemist Laboratories, Nairobi.

On 9th July 2008 **PW 17** received a blood sample of the deceased, and a small sword. He was asked to confirm if the sword had blood; and if so, he was to do grouping of the blood samples to ascertain if they had any relationship.

After carrying out the analysis, **PW 17** noted that there were blood stains on the sword, and that the said blood matched the blood group of the deceased. **PW 17** therefore formed the opinion that the blood on the sword came from the deceased, after she was injured.

PW 18, NO. 67029 CPL LAWRENCE KIIYA, was attached to the Githurai Kimbo Police Station, at the material time.

He was on patrol duty when he was called back to the station, where he found the accused already under arrest. He noticed that the accused had some injuries, which he had apparently sustained when he was beaten up by a mob.

After **PW 18** testified, the prosecution closed its case. The court thereafter gave consideration to the evidence adduced, and held that the accused had a case to answer.

In his defence, the accused largely corroborated the evidence of the prosecution.

First, he said that on 29th June 2008, he took **PW 2** out for dinner. But before going out, he had given to her KShs.1,200/-, his mobile phone and a wallet containing his Driving Licence, National Identity Card, PSV Licence and his Driver's Identification Badge.

The accused was a driver of a bus that used to ply "Route 45", between Githurai and

Nairobi Town.

It was his evidence that he did not know that **PW 2** would be working on 30th June 2008. However, he, (the accused) was off-duty on that day.

When he got up at about 8.00a.m., he found that **PW 2** had left for work at 6.00a.m. He therefore rested until 11.00a.m., when he went to have some drinks at the Githurai Shopping Centre. He also had some meat for his lunch, and then continued drinking until 6.30p.m.

On the following day, the accused was scheduled to go to Kenya Breweries Limited, for an interview, to become a trailer driver. He therefore decided to go and spend that night, (of 30th June 2008), at his rural home, in Wangige.

However, he needed to first get his Driving Licence and other documents from **PW 2**. He therefore went to the house which the two of them shared as husband and wife.

It was the reasoning of the accused that he needed to spend that night at Wangige because it is there that his C.V. and his Certificate of Good Conduct were kept. Those two documents were going to be required at the interview.

But when the accused reached home, he found the door locked. And as he did not have his set of keys, he went into the house of their neighbour, Wairimu, to wait for **PW 2**. Wairimu told him that **PW 2** had gone to buy vegetables for supper.

In a little while, the accused heard their small child crying, and he knew that **PW 2** had returned. He therefore went and knocked on her door. But she did not open immediately. She only opened after he had knocked again, and also after he had spoken to her.

When he entered the house, it was dark, as **PW 2** had not yet lit the lantern. Meanwhile, the electricity to the plot had been disconnected.

The accused said that he sat on the seat near the door. He then asked **PW 2** for the items he had given her the night before. He also told her that she had offended him as he had planned to spend that night at Wangige.

According to the accused, **PW 2** answered him rudely, and he slapped her, without intending to do so. He was annoyed, and continued demanding his things.

PW 2 then reminded him that he had, earlier on that day, sent her brother Karoki, to collect the said items from her. Karoki was a friend of the accused.

It is then that the accused recalled having sent Karoki to get the items for him. He therefore calmed down, and decided to go to Wangige early the next morning.

But before long, the accused heard a crowd talking outside the house. One person said;

“Maneno gani haya mnafanya kugombana na mumeo?”

meaning;

“what is this that you are doing, quarrelling with your husband?”

Before the accused or **PW 2** replied, the accused was slapped on his face. He sensed danger, and got up. But as it was still dark, the accused says that he did not recognize the intruders. He therefore decided to get out of the house.

When he got up, someone grabbed him from the back pushing and beating him.

Eventually, he got out, where he found a crowd of people. **PW 2** saw the crowd grabbing the accused and told them not to beat him as he was her husband. **PW 2** also said that the accused had done nothing wrong.

It is then that he heard someone say that a lady had been stabbed with a knife. By then, the accused says that he was outside the house.

PW 2 then said that it was true that a lady had been stabbed. She therefore advised that the matter be reported to the Chief's Camp. According to the accused, he together with **PW 2** walked to the Chief's Camp, together with about 10 people.

The accused testified that **PW 2** reported that her sisters had beaten the accused after his fight with **PW 2** had ended. He also said that his wife handed over the knife to an officer at the Chief's Camp, even though **PW 2** said that he was surprised to learn that Fridah had been stabbed with a knife.

The officer did not ask any questions, but simply hand-cuffed the accused.

He was later treated at the GSU clinic. Thereafter, he was charged with a murder that he knew nothing about.

As I stated at the outset, the defence put forward is largely in line with the prosecution

case. In the circumstances, it is crystal clear that on the night of 30th June 2008, the accused was with **PW 2** in one house. The two of them quarreled over some money which the accused had given to **PW 2** on the previous night. The accused had also given to **PW 2** his wallet which contained his Driving Licence, National Identify Card, PSV Licence and Driver's Identification Badge.

PW 2 did not give the money or the wallet to the accused because she no longer had them. She had given them to her brother, Karoki, to take to the accused: and she had done so after the accused instructed Karoki to collect the said items.

However, before recalling that it is he who had given instructions to Karoki to collect the items from **PW 2**, the accused felt that **PW 2** was being rude. He therefore slapped her.

PW 2's three children ran out of the house when the accused hit **PW 2**. **PW 1** found the children outside, and they told her that their mother was being beaten by an Uncle.

PW 1 then heard **PW 2** pleading with the accused, not to kill her. It is then that **PW 1** rushed to get assistance. She went to the market place, and found amongst others, **PW 3**, **PW 4** and the deceased. Those three people rushed to **PW 2's** house. They found the accused seated on a chair, next to the door.

Inside the house, there was no light that was on.

The accused says that he was therefore not able to recognize any of the persons who entered the house.

However, **PW 2**, **PW 3** and **PW 4** all said that they saw those who were in the house. They were able to do so because there was moonlight outside, and the door was open.

To my mind, the fact that those three prosecution witnesses were able to see the accused, where he was seated, which fact the accused confirmed, indicates that although there was no lighting inside the house, it was not too dark.

In those circumstances, it was possible for **PW 2**, who had been inside the house for much longer, and whose eyes must have become better accustomed to the situation, to have seen the knife which the accused threatened her with.

By his own admission, the accused was drunk. He had been having drinks between 11.00 and 6.30p.m. But even in that state, when he was annoyed by **PW 2**, he was able to slap her. That implies that he was able to see where she was, sufficiently clearly as to be able to aim his hand at her face.

I am completely convinced by the evidence adduced, that when the accused "pushed" the deceased, he did not use his bare hands. He did so, using the knife with which he had earlier threatened **PW 2**. And he did so with so much force that the deceased was pushed out of the house.

The accused did not use the knife in a haphazard manner. He applied the knife with such clinical precision, that it penetrated the chest of the deceased, and lacerated her heart. By striking straight at the heart of the deceased, using a knife, and with a lot of force, the accused either intended to kill the deceased or to do grievous harm to her. He knew or should have known that when a knife is directed, forcefully, through a position which was in line with the victim's heart, such action would probably cause death or grievous harm.

Whether or not the accused was indifferent that his action would probably either cause death or grievous harm, that would be immaterial, because, pursuant to the provisions of section 206 of the Penal Code, he would nonetheless be deemed to have had malice aforethought.

In the result, I do find the accused guilty of murder, as charged. He is hereby now convicted for the said offence.

Dated, Signed and Delivered at Nairobi, this 26th day of April, 2010.

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FRED A. OCHIENG
JUDGE