



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CRIMINAL CASE 46 OF 2008

REPUBLIC.....PROSECUTOR

VERSUS

PETER NGATIA MWANGI.....ACCUSED

J U D G M E N T

By an information dated 18th August, 2008, the state charged one, **Peter Ngatia Mwangi**, hereinafter referred to as “*the accused*”, with murder contrary to *Section 203* as read with *Section 204* of the Penal code. The particulars were that on the 3rd July, 2008 at Kangaita farm in Nyeri District within Central province, the accused unlawfully murdered **Grace Wanja Muthee**. The accused pleaded not guilty to the charge and his trial ensued. In total, the prosecution called 8 witnesses whose evidence may summarized as follows:-

PW1 was a minor aged about 13 years. After voire dire examination of the witness by the court, the court formed the opinion that the witness was possessed of sufficient intelligence and understood the meaning of an oath and the need to speak the truth. Accordingly she was allowed to testify on oath. She told the court that on 3rd July, 2008 at about 7 p.m she was at home with her brother **Wilson Muthee** doing homework in the main house. Suddenly she heard someone knocking the kitchen door. The kitchen is separate from the main house and about 5 metres away. The person knocking the kitchen door was saying “*Hodi*” and was a man’s voice. She recognized that voice as her uncle’s, the accused. In the kitchen at the time was her aunt, **Grace Wanja Muthee** hereinafter referred to as “*the deceased.*” She was preparing supper. The witness thereafter heard the door being opened and soon she heard as though someone had been hit. Screams rent the air. She rushed to kitchen only to find the deceased lying on the floor bleeding from the head with her eyes wide open. She did not see the accused though. She called out the deceased but she could not respond. She rushed to her grandmother’s (PW3) house, 15 metres away and told her what had transpired. She came along to the kitchen and on observing the situation she told PW1 to go and call her grandfather **Samuel Mwangi** (PW4). She went for him and together they came back. PW4 started applying first aid to the deceased using a piece of cloth soaked in water. The deceased was unconscious. PW4 then asked PW1 to go and call her other grandmother. The trio then changed the deceased clothes and arranged to rush her to hospital using one, **Mr. Muturi’s** motor vehicle. On the way to hospital, they passed through Igichiria police post and reported the incident. They then proceeded to Nyeri PGH where she was admitted. Her 2 grandmothers were left behind to attend to the deceased as the witness and PW4 returned home. Later they were informed that the deceased had passed on. Though the witness did not see the accused during the incident she was none the less

categorical that she knew the deceased voice and that she was certain that it was his voice she heard on the material day.

Cross-examined by **Mr. Gitahi**, learned counsel for the accused, she stated that there were 6 houses in the compound. The accused's house was 3rd. Thus the compound has many people. There person who was knocking the door was saying "**Hodi.**" She also heard him say ".....**Wanja nihindi uraruga supper**" in kikuyu meaning "**Hey Wanja! Is it time that you are preparing supper....**" She conceded however that she never saw the person who uttered those words. She also conceded that as a family, they visit each other quite frequently. She confirmed that she had recognized the accused's voice as she knew him very well. The deceased was at the time alone in the kitchen. At the police station the deceased attempted to talk but she was incoherent.

Asked questions by court, she stated that the accused was her uncle. Her mother was a cousin of the deceased. The deceased was also a cousin of the accused.

Second to take the stand was **Mary Wanjiku Ngunjiri**. She testified that on 3rd July, 2008 whilst at home at about 11 a.m she asked the accused to get her an axe from their home so that she could split fire wood with which he did. At about 7 p.m the accused went for the axe. 15 minutes later she was called by PW1 who informed her that the deceased had been injured. She accompanied PW1 to the scene and found pw4 holding the deceased's hands. When she called out the deceased's name she could not respond but just looked at her. She was bleeding profusely from the head. They looked for a motor vehicle from one, **Muturi Njanjo**, a neighbour and took the deceased to hospital by passing through Igichiria police post first. At Nyeri PGH, the deceased was admitted. However she had regained consciousness and was screaming. "**Help me, help me.**" The deceased remained in hospital for 3 weeks before she passed on. However, all these times she was comatose. At the police station she was shown an axe which had been recovered from the accused's house. It was the same axe that she had asked the accused to get her on the material day.

Cross-examined, she responded that there were many houses in the compound. The set up was one of extended family. There were about 5 houses in the homestead excluding kitchens. There were about 5 families in the compound with about 15 adults. The deceased was unmarried but was staying with PW1, her young brother, **Wilson Muthee** and her own son, **Muthee**. She had borrowed the axe at about 11am. It was not the first time she was borrowing the axe from the accused's home. She did not know where the accused took the axe after he came for it. Initially the accused had been charged with assault causing actual bodily harm.

Agatha Wangechi Mwangi, the mother of the accused was the 3rd witness. Her evidence was that on 3rd July, 2008 at about 7.30pm she was preparing supper at home. PW1 called her and they went to a kitchen where they found the deceased lying on the floor on her belly. She was unconscious. She was bleeding from the forehead. With PW4 they attempted to give her first aid. They got a vehicle and took the deceased to the police post enroute to Nyeri PGH where she was admitted. Subsequently the accused was arrested from her house. From the accused's house they recovered an axe. She identified the axe in court as the one which belonged to her homestead.

Cross-examined, she stated that besides the accused, she had other sons who stay within the homestead. There was nothing wrong with PW2 borrowing her axe though. The kitchen was about 5 meters away from the main house. Its door was wide open. She saw in the kitchen a sufuria with potatoes and cups. The deceased was lying on the floor near the cooking stones.

PW4 was **Samuel Mwangi Wachira**. He is a former army officer. On the material day, he was at home in the company of PW3 when PW1 came and informed them that her aunt was lying on the ground having been hit on the head. PW1 however did not say who had hit her. Together they went to the scene and found the deceased lying on her stomach in a pool of blood. She had been injured on the head. He never saw any weapon nearby. He instructed PW3 to look for a vehicle so that they could take the deceased to hospital. A vehicle was found and they took the deceased to hospital. On the way they passed through Igichiria police post and reported the incident. At Nyeri PGH hospital, the deceased was

admitted but passed on after 20 days. He later came to know that the deceased who was his son was the one who had hit the deceased. When the accused was arrested, he was present and saw the police recover an axe from underneath a mattress in the accused house.

Cross-examined he stated that the accused was arrested on 8th July, 2008. All the time the accused was at home. Nobody had mentioned his name in connection with the deceased death. Nobody saw the accused commit the offence. His homestead consists of 7 houses with a total of 15 adults. However he did not know how the deceased met her death.

PW5 **Richard Mute Wachira** testified that on the material day he was feeling unwell and sleeping in his house. At about 7.20 p.m he was called by PW3 who requested him to look for a vehicle to take the deceased to hospital as she had been hit and seriously injured. They went looking for the vehicle and found one from the neighbour, **Muturi Njanjo**. On the way to hospital, they passed through Igichiria police post. The police officers advised them to take the deceased to Nyeri PGH. They proceeded there and the deceased was admitted. They never got to know who had hit her. He was not present when the accused was arrested. He also came to know about the axe in court. Two weeks following her admission, the deceased passed on.

When cross-examined he testified that he did not see the accused on the material day. That the accused father (PW4) was questioned by police about the incident and he denied knowledge of who had committed the act.

PW6, **George Wachira**, was a retired Nurse. He identified the body of the deceased to the Doctor who performed the post mortem. She was the deceased's maternal aunt.

PW7 was **Dr. Wanda Kanuki**. He produced the post mortem report on behalf of **Dr. Cherotich** who had conducted the same on 29th July, 2008. Counsel for the accused not objecting I allowed the witness to testify and produce in evidence the post mortem report on behalf of **Dr. Cherotich**. As a result of the examination, the Doctor formed the opinion that the cause of death was septicaemia following head injury with subdural haematoma in a pregnant lady.

Cross-examined he stated that septicemia meant blood infection. It may be bacterial or viral. The injury was on the top of the head. He ruled out the possibility of the deceased having fallen. Pregnancy too had nothing to do with the death of the deceased.

The last witness called by the prosecution was **Corporal Dan Kagambe**. He stated that on 6th July, 2008 he was at Nyeri C.I.D offices when he was called by the D.C.I.O, Nyeri, and instructed to commence investigations in this case. In the company of Corporal Wanjiru they visited Nyeri PGH and found the deceased in a coma in the ICU. They then proceeded to the home of the deceased and learned that the accused had collected an axe from the home of the PW2 on the same night that the deceased was assaulted. On 8th July, 2008 they went to the house of the accused. When he refused to open, they forcefully entered the house. They searched the house. In the process the accused volunteered information that there was an axe under the mattress on a bed. They retrieved the same. The accused was then arrested. After interrogation, he was charged initially with assault occasioning grievous bodily harm. However when the deceased passed on, accused was then charged with murder, the other charge having been withdrawn. He tendered in evidence the axe he had recovered from the accused's house.

Under cross-examination, the witness stated that the axe had no blood stains. So it could not be subjected to any analysis. That the accused collected the axe moments before the deceased was assaulted. The accused could not have taken the axe to cut wood at that hour of the night.

With that evidence, the prosecution closed their case. Counsel for the accused opted not to make any submissions on no case to answer at that stage.

Having carefully perused the evidence tendered, I formed the opinion that the prosecution had

established a prima facie case against the accused to warrant him being put on his defence. Accordingly I placed the accused on his defence. He opted to give an unsworn statutory statement and had no witnesses to call. In his defence he stated that he was a farm hand. On 3rd July, 2008 he woke up feeling unwell. Around 11 a.m a wife to his uncle came and borrowed a family axe. At around 6.45 p.m he went for the same. When done he proceeded to Kangaita shopping centre to buy medicine and to watch a movie. At about 9 p.m. he returned home. He did not find his parents. He found his young brother though and on asking him where their parents were, he told him that they had taken the deceased to hospital as she had been hit by a person she hadn't recognized. That was not the first time that PW2 had borrowed their axe. He maintained that PW8 lied to court when he stated that the accused had used the same axe to hit the deceased. The axe was not found below a mattress as claimed by PW8. Rather it was found where it is normally kept. PW1 must have mistaken his voice when she claimed to have recognized the same. He did not have a unique voice. In deed his voice was similar to those of his cousins, **Dickson Mwangi, Michael Wachira, Wilson Muthee and Richard Mute**. He denied vehemently having committed the offence. The accused then closed his case.

In his final submissions, **Mr. Gitahi** stated that the prosecution had not proved beyond reasonable doubt that the accused murdered the deceased. Nobody saw the accused inflict the fatal injuries upon the deceased. The evidence of PW1 was to the effect that she recognized the voice of the accused. That evidence is based purely on suspicion. No evidence was led as to the uniqueness of the accused's voice. There is therefore room for mistake as there were other people in the homestead of the same age as the accused. There was no evidence of prolonged discussion between the accused and deceased that would have enabled PW1 to unmistakably connect the accused with the voice. There was no evidence of any grudge between the deceased and accused to justify the accused attacking the deceased. Similarly there was no proof that the axe produced in court was the murder weapon. The accused advanced a defence of alibi which had not been displaced. The case being one of circumstantial evidence, counsel submitted that the inculpatory facts did not point irresistibly to the guilt of the accused. For this submission, counsel relied on the case of **Omar Mzingu Chiemera V Republic C.A. No.56 of 1998 (UR)**.

In response Mr. Orinda, learned Senior Principal State counsel submitted that the prosecution had adduced sufficient evidence to prove the case to the level set by law. The evidence of PW1 was to the effect that she recognized the voice of the accused. That evidence cannot be faulted as the accused was frequent visitor to the house. She was therefore accustomed to her voice. Nothing bars the court from relying on a single witness on identification as long as the court warns itself of the dangers of so doing. PW1 was consistent and reliable witness. The circumstantial evidence was that the accused was seen in the vicinity of the scene of crime. He collected an axe from PW2. Alibi defence cannot hold in the face of overwhelming prosecution evidence. The Alibi defence was infact an afterthought as he did not raise it early enough in cross-examination of prosecution witnesses. Going by the nature of the injuries inflicted, whoever caused them most certainly intended death. That is malice aforethought.

I have carefully read, considered and evaluated the evidence tendered by the prosecution as well as the defence of the accused. To my mind, there are basically two issues in this case which call for determination. First, whether the deceased was murdered and secondly, whether she was murdered by the accused. It is trite law that not every killing amounts to murder. There is accidental killing which might amount to manslaughter. Murder on the other hand is intentional killing with malice aforethought. In the circumstances of this case it is common ground that the deceased was killed. There is the post mortem on record in verification of that fact. Now was the killing intentional or accidental. The evidence on record shows that nobody saw the deceased being killed. Most of the witnesses who testified were relatives of both the deceased and accused. None of them testified of any grudge existing between the deceased and her relatives or indeed any other person that would have driven such person or relative to plan and eventually execute the plot to kill the deceased. So that on the face of it, it is difficult to establish malice aforethought as it is commonly understood. However as per *Section 206* of the Penal Code, malice aforethought is deemed to be established in one or more of the following circumstances:

“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;
- (c) an intent to commit a felony;
- (d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.”

In the circumstances of this case, there is no doubt at all going by the nature of injuries inflicted on the deceased that whoever caused them must have certainly intended the death of the deceased. The injuries inflicted on the deceased to which she later succumbed to were grievous. Indeed when arrested and before the deceased passed on, the accused had already been charged in the Chief Magistrate’s court, Nyeri, with the offence of assault occasioning grievous harm in Criminal Case number 710 of 2008 according to the testimony of PW8. In those circumstances it can be said that malice aforethought had been established. That being the case, there is no doubt therefore that the deceased was murdered and I so hold.

Who murdered the deceased then? According to the prosecution, it is the accused. Where is the evidence? To the prosecution, the evidence is two pronged; voice recognition and circumstantial evidence. However before I consider in detail the said evidence, I must from the onset express my disappointment and disgust with regard to the relatives of both the deceased and accused who testified in this case. Save for PW1, all the other witnesses (PW2, PW3, PW4 and PW5) knew a lot more with regard to the circumstances that led to the death of the deceased. However they deliberately and perhaps intentionally held it back for reasons I am unable to fathom. For instance, how can PW4, who is a former army officer claim that though the deceased was killed he never took upon himself to find out who may have done it, and the circumstances that may have led to the incident. There must have been a reason why the deceased was killed. Was it as a result of family squabbles or grudges. He also deliberately gave contradictory evidence regarding the death of the deceased. Those witnesses, I could tell knew something in the family that may have precipitated the killing of the deceased but were unwilling to tell. However as a court of law, I can only act on the evidence tendered. I cannot substitute my own views and feelings for the evidence tendered.

PW1 was very candid in her evidence. To my mind she was a truthful and honest witness. She testified hearing someone knocking at the kitchen door where the deceased was preparing supper and saying “**Hodi**”. She recognized the voice as being a man’s and thereafter words to the effect “**Hey Wanja, is it time that you are preparing supper....**” Uttered in Kikuyu language. To her the voice was unmistakably the accused whom she had known for long and was familiar with his voice. He was after all her paternal uncle and they all stay in the same compound.

Of course evidence of voice recognition is admissible in court and can, depending on the circumstances, carry as much weight as visual identification. However as stated by the court of appeal in the case of **Chogo V Republic (1985) KLR 1:**

“...In receiving such evidence, care would be necessary to ensure that it was the accused person’s voice, that the witness was familiar with it and recognized it and that the conditions obtaining at the time it was made were such that there was no mistake in testifying to that which was said and who had said it...”

In the circumstances of this case, PW1 was in the main house 5 metres away from the kitchen engrossed in homework with her brother, **Muthee**. She initially only heard the word “**hodi.**” These other words allegedly spoken by the accused only came out during cross-examination. There are many other male

adults in the home stead. There is also other evidence that these families visit each other frequently. To my mind the conversation was so short such that it was unlikely that PW1 would have positively recognized the persons voice so well as to attribute it to the accused. The accused stated that he shares similar voice with his cousins. That evidence was not discounted nor displaced. The discussion was not prolonged such that would have enabled PW1 to unmistakably connect the accused with the voice and therefore eliminate the possibility of other persons. Accordingly, it will be unsafe for me to rely on PW1's alleged voice identification of the accused to find a conviction against him. That evidence is not free from possibility of an error.

Even if I had held that PW1's evidence as regards voice identification was solid, I would still not act on it because, she was a child of tender years. Her evidence thus required corroboration. I do not discern any corroborative evidence from the other evidence tendered. Again she was also a single identifying witness. Of course it is trite law that a court may convict on the evidence of a single witness provided it warns itself of the dangers of relying on the testimony of a single witness on identification, and the difficult circumstances under which the said identification was made. However as I have already stated, PW1 was a minor. As a matter of law, her evidence must be corroborated. Since there was no such evidence of corroboration I cannot act on such evidence even if I warned myself ten times. The story may have been different however had she been an adult.

The totality of the foregoing is that I am not satisfied with the evidence of voice recognition. Accordingly I reject the same.

Mr. Orinda, submitted that there was circumstantial evidence connecting the accused to the offence. What was the circumstantial evidence? That the accused was seen in the vicinity of the scene of crime, that he had taken an axe from PW2 and 15 minutes later the deceased was hit and injured . That it was not a mere coincidence that the injuries sustained by the deceased were consistent with those of a person struck with an axe.

Where the prosecution's case depends on circumstantial evidence the law is settled that first the circumstances from which the inference of guilt is sought to be drawn must be established by cogent and credible evidence. Secondly, those circumstances should point to the guilt of the accused and thirdly, when the said circumstances placed together and or taken cumulatively they 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 no one else. In a nutshell the inference of guilt should only be drawn where the facts said to incriminate the accused are incapable of any other rational explanation except the guilt of the accused and are wholly inconsistent with his innocence. See **Omar Chimera V Republic (supra) and Mwangi V Republic (1983) KLR 522.**

Yes, the appellant was in the vicinity of the scene of crime. Nothing turns on that fact as the scene was in their homestead. Indeed the accused in his defence admits having been in the homestead throughout sleeping as he was feeling unwell. He had been in the homestead until about 7 p.m when he left for Kangaita market to buy drugs and also watch a movie. The other piece of circumstantial evidence was that the accused collected an axe from PW2 at about 6.45 p.m. and shortly thereafter the deceased was found injured. The injuries allegedly were consistent with the deceased having been struck with an axe. The evidence on record however if believable, shows that PW2 had at about 11 a.m asked the accused to get her an axe from his home as she wanted to split firewood. He did so. Later in the evening he went for the same. There is evidence that borrowing of axes within the family was a normal occurrence. It was shortly after the accused had collected the axe that the deceased was found injured. However and contrary to the submissions of Mr. Orinda, there is no evidence that the injuries sustained by the deceased were consistent with having been struck with an axe. Indeed the post mortem report is silent on the weapon used to inflict the injuries whether blunt or sharp. Perhaps this information would have been gleaned from the P3 form. Initially the accused had been charged with grievous harm. Surely that must have been on the basis of the doctor's opinion regarding the nature and extent of the injuries sustained by the deceased. The P3 form therein would have shown whether the weapon used was sharp or blunt. There is no reason why such evidence could not have been tendered. In the absence of such evidence, one cannot be certain that the said injuries were inflicted by an axe. There was no proof that

the axe produced in evidence was indeed the murder weapon therefore. It was not even recovered at the scene of crime. Nobody saw the accused using the axe to hit the deceased.

It is rather interesting that when PW8 was conducting the search in the accused's house, it is the accused who volunteered the information to him as to where the axe was. Why would the accused do such thing knowing very well that he had used it to inflict fatal injuries to the deceased. Further having committed the alleged offence, the accused remained around and never took steps to avoid possible arrest even after the deceased had passed on. That is not the conduct of a person who had committed such heinous crime.

In conclusion I am satisfied that the prosecution has not proved the charge against the accused beyond reasonable doubt. Accordingly I have no other alternative but to acquit the accused of the charge. It is so ordered.

Dated and delivered at Nyeri this 22nd day of July, 2009.

M.S.A. MAKHANDIA

JUDGE