



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA**

AT KISII Criminal Case 40 of 2006

REPUBLIC PROSECUTOR

VERSUS

PASCAL WAITHAKA WARUGU alias URA ACCUSED

JUDGMENT

The accused was charged with murder contrary to **section 203** as read with **section 204** of the **Penal Code**.

The particulars of the offence were that on the 25th day of August, 2006 at Olororsoito sub location in Kilgoris District, within Rift Valley Province, the accused murdered **Nancy Renoi Olimaati**, hereinafter referred to as “**the deceased**.”

The prosecution evidence briefly stated was that:

On 27th August, 2006 **Benson Bayani Matashi, PW1**, who was the acting Assistant Chief of Olororsoito sub location, was called by one Kipchoge Redama who informed him that there was a strange smell emanating from the accused’s house. PW1 went to the accused’s home and found no one there. The main door was locked but the curtains were thrown. PW1 decided to make a report at Kilgoris police station. The police accompanied him to the accused’s home. They broke the main door and found the deceased’s body which was placed in a sack. The sack had been tied with a sisal rope. The police removed the body from the sack. The police also recovered from the house a lady’s jacket which was blood stained.

After that PW1 went to Kilgoris town to look for the accused who was suspected of having murdered the deceased. He managed to trace him and had him arrested. He was taken to Kilgoris police station and **Police Constable Julius Mukora Ratimo, PW4**, placed him in the cells. The accused and the deceased were living together in the house where her body was found. That was confirmed by the accused’s landlord, **Morris Mrefu Mulinge, PW5**.

Police Constable Justus Mutua, PW2, and **Police Constable David Mutai, PW8**, are some of the police officers who accompanied PW1 to the accused’s house. They corroborated the evidence of PW1 in all material aspects.

Nicholas Kimeli, PW6, is a brother to the deceased and had known both the accused and the deceased for sometime. He said that the accused, who was also nicknamed as “**Ura**”, was staying with the deceased and the two used to quarrel often. He said that the deceased had severally been assaulted by

the accused. After the death of the deceased PW6 is the one who identified the deceased's body for purposes of postmortem which was conducted by a Doctor Musalia at Kilgoris District Hospital. The postmortem report was produced by **Dr. Robert Mutula, PW9**, on behalf of Dr. Musalia. It indicated that the deceased had a deep cut on the skull and a linear fracture on the temporal bone. The cause of death was given as cardiac arrest due to severe head injury caused by a heavy blunt object.

Paul Marsabit Tiondo, PW10, was staying in the same plot as the accused and the deceased. On 24th August, 2006 at about 11.00 p.m., he heard a lady screaming inside the accused's house. She was saying that she is being killed. He recognized the voice as that of the deceased. He also heard the accused asking the deceased why she had spent the night out of the house. In the morning PW10 found the house locked. He went to work and when he returned the house was still locked. It remained locked for about 4 days. A foul smell started coming out of the house. The accused and the deceased were nowhere to be seen. That is what prompted the neighbours to call the Assistant Chief and the police. The witness added that before the deceased and the accused started staying together, the deceased had been married by someone else and they had three children. But at the material time the deceased and the accused were living together.

In his defence, the accused said that on 23rd August, 2006, he travelled with the deceased to Lolgorian. On the way the deceased began to explain to him that she was experiencing pain in her head. She said she had been beaten by her husband who used to accuse her of unfaithfulness. When they alighted from the vehicle, he spotted two police officers. The two police officers greeted them and went away. The deceased asked him for some money to buy wild vegetables and he gave her Kshs. 30/=. Thereafter he went to look for charcoal as he was a charcoal dealer. He was in the forest for about 3 days and managed to get six bags. On the day he went to sell the charcoal at a local hotel, he met PW1 who told him that the police were looking for him. He accompanied him to Kilgoris police station where he was arrested. On the following day he was taken to his house and asked to open the same. Nothing was found therein. The police took him to a hospital where his blood sample was taken. He was returned to the cells where he remained for 47 days. He alleged that the police tortured him in the course of their interrogation. He denied having murdered the deceased.

Mr. Mogire for the accused submitted that the prosecution evidence was entirely circumstantial and the same was too weak to sustain a conviction. He further submitted that the accused had been held in unlawful police custody for 47 days and that amounted to violation of his constitutional right in terms of the provisions of **section 72 (3) (b)** of the **Constitution** of Kenya. He therefore urged the court to acquit the accused.

Mr. Kemo, Senior Principal Prosecution Counsel, submitted that the circumstantial evidence that had been adduced clearly pointed at the accused as the only person who could have murdered the deceased. He cited **MWANGI -VS- REPUBLIC** [1983] KLR 522. He however said nothing about the alleged violation of the accused's constitutional right.

The evidence of PW10 is quite telling. This witness was living in the same building as the accused and the deceased. On 24th August, 2006 at about 11.00 p.m. he heard the deceased screaming inside their house. The accused was the only other person in that house. The deceased said that she was being killed. The accused was asking the deceased why she had spent the previous night out of the house. After a short while there was silence. PW10 went to bed but when he woke up in the morning the accused's house was locked from outside. It remained so for 4 days. By that time foul smell was already coming out of the house. The accused was nowhere to be seen. Why had he disappeared from his house suddenly? He must have killed the deceased and put her body in the sack before he vanished.

Evidence was led to the effect that the accused and the deceased used to quarrel often and that the accused had severally assaulted the deceased.

The accused's defence, weighed against the prosecution evidence, was untenable. I am satisfied that the inculpatory facts in this case are incompatible with the professed innocence of the accused and are incapable of explanation upon any other hypothesis than that of guilt.

I now turn to the vexing issue of alleged breach of the accused's constitutional right. In **GERALD MACHARIA GITHUKU –VS- REPUBLIC**, Criminal Appeal No. 119 of 2006, the appellant had been found guilty of robbery with violence and sentenced to death. His first appeal to the High Court of Kenya was unsuccessful. He preferred a further appeal to the Court of Appeal. One of the grounds of his appeal was that his constitutional right as enshrined in **section 72 (3)** of the **Constitution** had been violated. He had been held in custody for 17 days before he was arraigned in court. The law required that he presented to court within 14 days of his arrest, unless there was a good reason for any delay. The delay was therefore of 3 days. The Court of Appeal had this to say:

“... although the delay of three days in bringing the appellant to court 17 days after his arrest instead of within 14 days in accordance with section 72 (3) of the Constitution did not give rise to any substantial prejudice to the appellant and although on the evidence, we are satisfied that he was guilty as charged, we nevertheless do not consider that the failure by the prosecution to abide by the requirements of section 72 (3) of the Constitution should be disregarded. Although the offence for which he was to be charged was a capital offence, no attempt was made by the Republic, upon whom the burden rested, to satisfy the court that the appellant had been brought before the court as soon as was reasonably practicable.

.....
.....
.....

We therefore hereby order that the appeal be allowed, the appellant's conviction quashed and the sentence of death is set aside.”

As earlier pointed out, there was no explanation that was given as to why the accused herein was held in police custody for 47 days before he was brought to court. Although the court has a duty to punish criminal offenders, it must also uphold constitutional rights of such persons.

The above quoted decision is binding upon this court and no reason was given as to why this court

should not follow the same. Consequently, in view of the proven violation of the accused's constitutional right, I am constrained to acquit him of the charge of murder. He is set at liberty unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED AT KISII THIS 25TH DAY OF SEPTEMBER, 2009.

D. MUSINGA

JUDGE.

25/9/2009

Before D. Musinga, J.

Mobisa – cc

Mr. Mutai for the state

Mr. Ondari for Mr. Mogire for the accused

Court: Judgment delivered in open court on 25th September, 2009.

D. MUSINGA

JUDGE.