



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

Criminal Case 53 of 2009

REPUBLIC PROSECUTOR

VERSUS

MICHAEL NDERITU MWANGI ACCUSED

JUDGMENT

The accused **MICHAEL NDERITU MWANGI** is charged with **MURDER** contrary to section 203 as read with section 204 of the Penal Code. The particulars of the offence are that on 30th May 2009, at Motherland slums, Eastleigh Section III within Nairobi Area, Murdered **ANN NYAMBURA KAMANDE**.

The facts of the prosecution's case are that the accused and the deceased lived as husband and wife and that they had constant quarrels. On the material day it is the prosecution case that the accused held the deceased by the neck from behind and stabbed her with a knife on her abdomen before running away with the murder weapon. The murder weapon was never recovered. The prosecution case is that members of the public chased the accused person before the accused person surrendered to the police at Eastleigh Police Post, the same evening.

At the time of surrender he was not having the murder weapon. In addition he had a cut wound on the left eye brow.

The accused gave an unsworn defence and in that defence he denied stabbing the deceased at all. The accused person stated that on the material day he had delivered illicit brew to his customers during the day. That he had a fresh order to deliver to some of these customers that evening but that his wife, the deceased, insisted that he was not going to leave home that evening. The accused stated that both he and his wife had drunk a little and that when she held him to stop him from leaving, he slapped her. That on slapping her, his wife screamed attracting her family members. The accused stated that those who came included the deceased two sisters, one brother and two children of her sister. The accused person stated

that the deceased stabbed him on the left eye where he later got 8 stitches. That her siblings started beating him with sticks. That he held the deceased so that she does not stab him again but that as she pulled herself from him, she stabbed herself on the stomach. The accused stated that he slipped and ran away to the police post.

I have carefully considered the evidence adduced by both the prosecution and the defence.

No submissions were made in this case by both counsels, Mr. **Kabaka** for the State and Mr. **Anambo** for the accused person.

The burden of proof lies upon the prosecution to prove its case beyond any reasonable doubt. The prosecution case was that the accused person stabbed the deceased in the stomach and that it was as a result of that injury that she died. The defence on the other hand maintains that the injury was self inflicted by the deceased upon herself and that therefore the accused person is innocent of her death.

The prosecution called nine witnesses. Among these witnesses only one witnessed the incident. This was **PW4 DUNCAN MWENDA IRUNGU**. There were four other witnesses who came to the scene soon after the incident. These were PW1, 2, 3 and 5. The evidence of **Duncan** was that at 10 pm on the material day, he was seated outside **Kamande's** home together with the deceased. They were just chatting when the deceased stood up and walked 10 ft away and entered the house of one **Benta**. **Benta** was not called as a witness. **Duncan** says that he next saw **Nyambura** the deceased step outside **Benta's** house. It is then **Duncan** saw **Njaramba** the accused hold the deceased by the neck, saw him strangling her, and then he heard the deceased scream. That immediately upon hearing the deceased scream, the accused person released her and started walking towards him, **Duncan**. **Duncan** says that he noticed that the accused was holding a knife and so on seeing that he started screaming and running away from the accused. **Duncan** says that the accused person also started running and that he ran towards the river. **Duncan** says that he stopped running only when he noticed that people had been attracted by the screams. He says that after the people responded, he went to look for a taxi and found one had been summoned. **Duncan** testified that he then helped carry the deceased to the vehicle and accompanied her and others to Kenyatta Hospital. **Duncan** testified that at the time he assisted to put the deceased to the car, he noted an injury on the deceased from her left breast to the abdomen and also on the left arm.

I have considered the evidence of **Duncan, PW4**. Clearly, **Duncan** did not witness the actual stabbing of the deceased. All he witnessed was a struggle between the accused and the deceased during which the deceased was strangled by the accused person. He next heard a scream from the deceased before seeing the accused running away holding a knife. **Duncan** explained that there were clothes hanging on a line between him and the pair which stopped him from seeing the actual stabbing of the deceased. **Duncan** was however clear that the accused had a knife in his hand at the time he let go the deceased. **Duncan** was also categorical that no one else was present at the place where the incident occurred at the time it occurred therefore ruling out a possibility that the injury on the deceased was caused by someone else other than the deceased.

Before looking further into the evidence of **PW4**, and considering how it relates with the rest of the evidence, it is important to state that **PW4** was placed in cells in the cause of his testimony when all attempts to persuade him to speak audibly enough were fruitless. I had an opportunity to study this witness as he later testified and to examine his demeanour. I found him to be still suffering from the trauma of the incident he had witnessed 10 ft from where he had been sitting. I noted that the incident took place only on 30th May 2009. At the time **Duncan** was testifying, on 1st October, 2009, it was only four months since the incident. I also considered the relationship between **Duncan** and the deceased. According to **Duncan** he could call the deceased his aunt and further more they came from the same village and were great friends. I am persuaded to find that from all these facts and circumstances, **PW4 Duncan** was still traumatized for reason the incident was still very fresh in his mind and for reason he actually witnessed the accused accost the deceased an injury which may have led to her death. I found **PW4, Duncan** a truthful witness worthy of belief.

I now wish to examine the evidence of the other witnesses. There was **PW1 PURITY NJERI KAMANDE**, a sister of the deceased. Her evidence was she merely heard screams coming from the direction of her late sister's house. **Purity** described the distance between her home and accused person and deceased house as 30 meters apart. **Purity** stated that she went out to find the deceased holding her stomach with intestines protruding and accused person walking next to the deceased and towards her, (**Purity**) holding a knife. **Purity** says that her immediate reaction was to place the deceased behind her to shield her from the accused. She then took water which was warming on a *jiko* and threw the water at the accused person. That on so doing the accused person started running towards her and that to avoid him she ran all the way to Eastleigh Police Post, while at the same time screaming for help. **Purity** testified that later when she went back home she found a pool of blood at the door where she left the deceased.

The other evidence was that of **PW2 ALICE WITHERA KAMANDE**, another sister of the deceased. **Alice** testified that she too did not witness the stabbing of the deceased. **Alice** testified that she was in her house with her friends, preparing food for her young child. She stated that she heard someone scream. Then she heard her sister's name and hers, that is **Njeri (PW1)** and **Waithera (PW2)**, being called. **Alice** confirmed from her friends that they too heard her name being called out before going out to check. **Alice** testified that when she went out of the house, she met with the accused person holding a knife above his head as if ready to strike. **Alice** claimed that the accused person threatened her with the knife and that consequently she started running and that she ran towards the shops. **Alice** stated that she later saw a group of people chasing the accused person and that she joined the group. She later went home to find an impromptu fundraising going on to raise funds for her sister **Purity**, to go to Kenyatta hospital to check on the deceased.

The other witness was **PW3 STEPHEN KAMAU NJOROGE**. His testimony was that he was relaxing inside **Purity Njeri's** house. **Stephen** testified that **Purity** was a sister of his girlfriend **Waithera (PW2)**. **Stephen** testified that he heard screams outside and that he went out of the house to find the deceased holding her intestines and calling out the name **Njeri**. That he also saw the accused person behind the deceased holding a knife full of blood stains. **Stephen** stated that on seeing

him, the accused person ran away from the scene. **Stephen** said he knew both the accused person and the deceased before the incident. **Stephen** stated that he helped chase the accused person and that to escape; the accused person ran and surrendered to the Police at Eastleigh Police Post.

The other witness was **PW5 JANE WAMBUI KIARIE**. Her evidence was that she was visiting **Mama Joyce** and was at the home of **Mama Joyce** with her and her daughters that evening. **Jane** testified that at about 8 pm she heard the deceased screaming and calling out the names **Waithera** and **Njeri**. **Jane** testified that the house of the deceased was 5 meters from the house where she was. Upon going out of the house **Jane** testified that she saw the deceased lying on the door at the entrance to her house. **Jane** noted that the deceased was bleeding and that her immediate reaction was to look for a vehicle with the help of her friend's daughters, to take the deceased to hospital.

These were the persons around the scene at the time the incident took place. I wish to examine the evidence of PW1 to 5 in regard to consistency, discrepancies contradictions or otherwise of the evidence.

I have considered that the incident took place at around 8 pm, a time when the sun had already set. It was therefore at night. In regard to the lighting conditions at the scene at the time of this incident, **Purity, PW1**, described security lights at the scene as being big and bright and situated near the deceased and accused person's house, about 30 meters from her own house. **Alice PW2** on the other hand described the lights as being 30 meters from her house where she was when she heard the screams. According to **Alice** there was a big security light which was lighting the area facing down and which enabled her to see both the accused person and the deceased.

PW3 said he saw the accused person clearly due to an electric light which was outside the houses. **PW5** did not describe any lights.

Regarding identification I find that each of the witnesses **PW1, 2, 3 and 4 (Purity, Alice, Stephen and Duncan)** had a face to face confrontation with the accused person at the scene soon after the incident. For **Duncan** he saw the deceased strangle the deceased, and then he heard the deceased scream before the accused released her and walked away from her towards him holding a knife. He ran away when the accused person walked towards him menacingly. **Duncan** said he knew the accused person before for a period of one month when he, **Duncan**, lived at the plot. He, therefore, knew the accused person very well. The evidence of identification is therefore that of recognition by **Duncan, Purity, Alice** and **Stephen** who all saw the accused person holding a knife soon after the deceased was injured. **Purity** and **Alice** were sisters of the deceased and both knew the accused person very well. There could not have been any mistake in the identity of the person seen carrying a blood stained knife soon after the incident.

Stephen also knew the accused person before. I have no doubt that the accused person was the person seen by **Duncan, Purity, Alice, and Stephen** carrying a knife soon

after the deceased was stabbed in her chest and abdomen. In fact the evidence of **Purity** and **Stephen** was that the accused was walking next to the deceased as she walked towards **Kamande's** home(home of **Purity, Alice** and other family members) holding her protruding intestines. That in effect means that at the time the accused held the deceased by the neck as witnessed by Duncan, she had no injury; but by the time he released her, the deceased had such a severe injury that her intestines could be seen protruding from her stomach.

The accused on his part stated that the deceased caused her own injury in that she stabbed herself as she struggled with him in the presence of two of her sisters, one brother and two of her sister's children. I have considered this defense and analyzed it against the rest of the evidence. I must state that the defence did not suggest to any witnesses including the deceased own sisters who testified and whom the accused alleged were present when the deceased stabbed herself. However the counsel for the accused, Mr. Anambo, put a direct question to the Doctor who produced the post mortem form on the Deceased. **Dr. Njau Mungai** produced the post mortem form filled by **Dr Njeru** who performed the PM. In answer to the question whether the injury could have been self inflicted the Doctor ruled that out on the grounds that the injury to the lung and the abdomen was so deep as to be impossible for a person to inflict on themselves. The Doctor's own words were

“The incision or stab wound on the lung injury is impossible to have been self inflicted.

The depth of the incision from the abdomen to the lung demonstrates that one could not have thrust an object that deep to reach the lungs on their own. It is not self inflicted.”

I do find that the doctor's evidence ruled out any possibility that the deceased inflicted the injury on herself. The other significant piece of evidence from the doctor is that the injury which caused the deceased death was consistent with a stab wound with a sharp object. That is consistent with the evidence adduced by the prosecution that the deceased was stabbed in her abdomen and breast area just before her death. The cause of death is therefore clear that it was a stab on her abdomen which eventually led to her death.

The question is whether the evidence of the prosecution sufficiently establishes a nexus between the injury inflicted on the deceased and the accused as the one who inflicted it? Since the key witness did not see the accused actually stab the deceased, the evidence against the accused can be regarded to be circumstantial evidence. I will consider a few leading cases with regard to the principle of circumstantial evidence.

In the case of **R –vs- TAYLOR, WEAVER AND DONOVAN** (2) the principle as regards the application of circumstantial evidence was enunciated in these words:

“Circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensified examination, is capable of proving a proposition with the accuracy of mathematics. It is no derogation of evidence to say that it is circumstantial.”

In the case of KIMEU –VS- REPUBLIC (2002) 1KLR 756, the Court of Appeal held as follows:

“The court can only act on circumstantial evidence to support the conviction of an accused person if the evidence points irresistibly at the accused’s guilt to the exclusion of everybody else.

Before drawing the inference of accused’s guilt from circumstantial evidence, the court must be sure that there are no other co-existing circumstances which would weaken or destroy the inference of guilt of the accused.”

The Court of Appeal in KARIUKI KARANJA VS REP [1986] KLR 190 stated as follows regarding circumstantial evidence:

“In order for circumstantial evidence to sustain a conviction, it must point irresistibly to the accused and in order to justify the inference of guilt on such evidence, the inculpatory facts must be incompatible with innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt. The burden of proving facts justifying the drawing of that inference is on the prosecution.”

That statement is in line with the holding on the same point in the celebrated case of REX VS KIPKERER ARAP KOSKE [1949] 16 EACA 135.

I am guided by the *ratio deci dendi* in these cases. I have carefully considered the evidence by the prosecution witnesses and also by the accused in his defence. I find that the accused was seen by **Duncan** holding the deceased by her neck. **Duncan** had been with the deceased just before the attack and his evidence was that she was whole when she left him shortly before the attack. By the time the accused released the deceased, she had screamed and soon thereafter she was seen by **Purity** and **Stephen** holding onto her protruding intestines. I find in the circumstances of the facts of this case, no other inference can be drawn from these facts except that of the accused is the one who stabbed the deceased on her abdomen on the fateful evening. I therefore find the accused defence that the deceased inflicted the injury on herself untenable. Regarding the accused defence, the accused alleged that his siblings in law fought him and that the deceased stabbed him in the eye. The evidence of eye witnesses is that the accused had no injury by the time he left the scene of the incident. The eye witnesses testified that the accused was chased by people who were buying for his blood. He was under chase even when he gave himself up to **PC Mwangi**. Even the OCS PW7 **IP Matoke** found the multitude of people still after the accused and he had to persuade them to leave. I find that the injury on the accused must have been inflicted after but not in the cause of the attack on the deceased. Consequently I dismiss the accused defence that the deceased attacked him and also that the deceased self inflicted the injury upon herself.

I have examined the entire evidence in regard to the evidence as to whether there were contradictions, inconsistencies or variations or otherwise in the prosecution case. **Duncan** was definitely at the scene when the event started unfolding. His evidence was he saw accused person strangled deceased, she screamed and by the time the accused person released her, he had a knife in his hand. He ran away for his safety. **Purity** came out of her home to find the deceased holding to her abdomen with intestines hanging and the accused person with a blood stained knife behind her. Purity stated that she pulled the deceased behind her to shield her before throwing warm water at the accused person and before running for her life.

Alice stated that upon going out to check on the screams she met with the accused person with a knife lifted in one hand as if ready to strike. She ran for her life because according to her, the accused person threatened to stab her.

Stephen on his part met deceased walking in front of the accused person, holding her stomach with intestines hanging. The accused person was holding a blood stained knife. Stephen stated that the accused person ran away on seeing him. Jane on the other hand found the deceased lying on the door to her house bleeding profusely.

From the evidence of these five witnesses, I find that there is no contradiction in their testimonies. I find the differences in their evidence were variations which could easily be explained. It was born out of the fact that what each witness saw of the incident was at a different stage of the event and from a different time and distance. I find that there was no inconsistency or contradictions in their evidence. I find that **Duncan** witnessed the beginning part of the incident and his immediate reaction was to run away. The second to the scene was **Purity** and this is because the deceased was still walking towards the **Kamande's** home when she saw her and the accused person. She too ran away. Next in the scene was **Alice** who also ran away from the accused person's uplifted knife wielding hand. By then Alice saw the deceased walking towards the **Kamande's** home. **Stephen** came next after Alice and it is after he came to the scene that the accused ran away and was later pursued up to the Police Station. I also do think that there was a measure of anxiety and maybe confusion given the fact that the first people at the scene opted to run away rather than take any step to rescue or go to the deceased help. That is not surprising if one considered that **Duncan, Alice** and **Purity** were all young people in their early twenties and considering the nature of the injury the deceased suffered.

I find that the prosecution has adduced evidence to prove that the accused attacked the deceased with a knife inflicting serious injuries to her abdomen and lungs, and that the said injuries were the direct cause of the deceased death. I must also state here that the accused surrendered himself to the Police soon after the incident. Even though I am not relying on this fact, it is worth noting that when the accused presented himself to **PC Mwangi PW6**, at Eastleigh Patrol base, he informed him that he had killed someone. That statement is inconsistent with his defence.

The next issue to consider is whether the prosecution has established that the accused had malice afore thought to commit this offence. **Section 206** of the Penal Code defines malice afore thought as follows:

“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”.**

The evidence by the prosecution shows that the accused attacked the deceased and stabbed her deeply into her abdomen and chest causing severe and deep injury to her lungs and stomach. When the accused set upon the deceased and stabbed her with a knife in her abdomen, he must have known that the act of stabbing the deceased so deeply in her chest and abdomen could cause death or grievous harm to the deceased. In that regard I am satisfied and do find that malice afore thought was established as defined under **S. 206(a) and (b)** of the Penal Code.

In view of the foregoing, I am in no doubt that the prosecution has proved its case against the accused person on the required standard, beyond any reasonable doubt. Accordingly I find the accused person guilty of the offence of Murder under section **203** of the Penal Code. I convict him accordingly.

Dated at Nairobi this 18th day of December, 2009.

**LESIT
JUDGE**

Read, signed and delivered in the presence of

Elisha	Court clerk
Accused	Present
Mr. Kabaka	for the State
Mr. Anambo	for the Accused

**LESIT
JUDGE**

