



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**  
**Criminal Case 43 of 2004**

**REPUBLIC ::::::::::::::::::::::::::::::: PROSECUTOR.**

**VERSUS**

**TABITHA WANJIKU MWAURA ::::::::::::::::::::::: ACCUSED.**

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

The accused herein, *Tabitha Wanjiku Mwaura*, is charged with the offence of murder contrary to Section 203 as read together with Section 204 of the Penal Code.

The particulars are that on the night of 8<sup>th</sup> and 9<sup>th</sup> February, 2004 at Gakoe Village in Kiambu District within Central Province murdered one Peter Mwaura Mbugua (hereinafter referred to as the deceased)

The accused and the deceased are referred to interchangeably as the couple.

The prosecution called 11 witnesses.

*Peter Muchiri Kuria (PW1)*, owner and driver of taxi registration No. KMM 978 Toyota, was a taxi operator at Kiamaiko, in Githunguri, on the night of 8<sup>th</sup> and 9<sup>th</sup> February, 2004. In that capacity he was approached by the deceased to take him home. Upon payment of Ksh. 200/=, being his charges, he obliged. Time was about 11.30 p.m. He had ferried the deceased home from Kiamaiko at night on several occasions prior to the fateful night. He knew the deceased well. The deceased was his regular customer.

*Lawrence Ndichu Mbugua (PW2)*, was asleep at his house at Gakoe Village, on the night of 8<sup>th</sup> and 9<sup>th</sup> February, 2004. About 12.30 a.m., on 9<sup>th</sup> February, 2004, he heard screams of the accused. In response thereto he, armed himself with a stick and a torch and, went to the couple's house which was neighbouring his. Accused told him that thugs had entered the house. He took courage, entered and checked all the rooms. At the master bedroom he found the naked body of the deceased lying in a pool of blood. He instantly enquired from the daughter (*Anne Ngendo*) who was sleeping, in the only other room in the same house, if she had heard any commotion. She denied. With the assistance of the villagers who arrived piecemeal, he facilitated the taking of the deceased to Kiambu District Hospital, where he was pronounced dead on arrival. He reported the matter immediately to Githunguri Police Station. The body was taken to the mortuary. From the mortuary the CID Officers, stationed at Kiambu, accompanied them to the home of the deceased for purposes of initiating investigations.

*Stephen Kahara Wanjau (PW3)*, a neighbour was sleeping in his house on the night of 8<sup>th</sup> and 9<sup>th</sup>

February, 2004. He was awakened by the sound of a vehicle at the deceased home. About 40 or so minutes later, he heard screams of the accused. He braved it and went to the scene. He entered the bedroom of the deceased and found him lying naked on the floor in a pool of blood. Accused told him that the deceased had been attacked and injured by thugs in the house. He did not see any thug or intruder. In a joint effort the deceased was taken to the hospital where he was pronounced dead on arrival.

*John Thendo Mbugua (PW4)*, a neighbour, heard screams from the direction of the deceased's home on the night of 8<sup>th</sup> and 9<sup>th</sup> February, 2004.

On reaching the house he found deceased lying naked, in a pool of blood in his bedroom. He learnt, from the accused that the deceased had been attacked and injured by thugs. Jointly with others, he assisted in organizing the taking of the deceased to the hospital. About 1.30 a.m. he returned to the house of the deceased and learnt that the deceased's son, Mbugua, had cleaned the bedroom, the scene of the crime, by mistake. He admitted having instructed Mbugua to clean the sitting room to enable people to sit but not the bedroom. He was at a loss who instructed Mbugua to clean the scene of crime.

*Samwel Ngugi (PW5)*, a peasant farmer at Gakoe Village owns a motor vehicle. On the night of 8<sup>th</sup> and 9<sup>th</sup> February, 2004 Wanjau (PW3) and Mathengi asked him to ferry the deceased to hospital. The deceased was taken first to Githunguri Police Station. Thereat, directives were given to take the deceased to Kiambu District Hospital. The deceased was pronounced dead on arrival. A police officer accompanied him and villagers back to the home of the deceased.

*Samwel Meriro Mbugua (PW6)*, was awakened by screams of the accused to the effect that thugs had invaded their home. On reaching the house he found Lawrence Ndichu (PW2), Wanjau (PW3) and Gitau who had arrived ahead of him. He saw the naked body of the deceased in the bedroom lying in a pool of blood. He assisted in arranging for deceased to be taken to the hospital. The deceased was pronounced dead on arrival.

*David Wathigira (PW7)*, watched football match on the T.V., at the house of the deceased, in the company of accused and Gitau Mwaura from 7.30 pm on 8<sup>th</sup> February, 2004 and then went home to sleep. About 12.30 a.m., on 9<sup>th</sup> February, 2004, he heard accused screaming that thugs had invaded their house. He braved it. On reaching the deceased's house he noticed the naked body of the deceased lying, in a pool of blood, in his bedroom. He did not notice any breakage or hear from the accused that anything was stolen. He was in the team that arranged for the deceased to be taken to the hospital.

*No. 217310 Chief Inspector Gladys Gituku (PW8)*, was at Githunguri Police Station on 9<sup>th</sup> February, 2004 at 2.35 a.m when the deceased was brought covered in a blanket. He issued the reportee with a treatment note and referred the case to Kiambu District Hospital. She was later told that deceased was pronounced dead on arrival. She summoned CID Officers from Kiambu who joined them at the scene of crime. On interrogation the wife (accused) gave the story of an attack by thugs about midnight when the couple were asleep in their bedroom.

Since it was dark she sealed the scene. The following morning her team discovered that the bedroom had been washed, by the deceased's son, on instructions of a third party. She discovered blood in the corner of the house, a blouse and a piece of bloodstained timber. The scene was then photographed by scenes of crime personnel. Hence, Inspector Kamande took over investigations and he recovered exhibits, among which were two kitchen knives.

*Stephen Matinde Joel Weibe (PW9)*, a Government Pathologist based at the Government Chemist Laboratories, in the forensic section, received the following items.

- (1) Blood samples in a bottle taken from the accused marked item A.
- (2) A green spotted blouse marked item A1.

- (3) A piece of timber – marked item B.
- (4) A blue white stripped shirt with pink stripes which is blood stained marked - item B1.
- (5) A kitchen knife – marked item C.
- (6) A kitchen knife marked item D.
- (7) A blood sample of the deceased Peter Mwaura – marked item F.

He was asked to ascertain whether the blood on the blouse is the same blood group in Exhibit “F”. Whether blood stains on exhibit marked “B” is the same blood group with blood in Exhibit marked “F”. Whether the exhibit marked “C” has got blood stains and whether the stains are of the same blood group with the blood in the exhibit marked “F”. Whether the exhibit marked “D” has got blood stains and if the same stains is of the same blood group with the blood marked Exhibit “F”

Upon examination of the aforesaid items, he came with the following findings:

1. Blood sample of the suspect – now accused – was found to be of Group “O”.
2. Blood sample of the deceased was found to be of group “B”.
3. The blouse item 1A and the shirt item B1 were found to be slightly stained by human blood of group B belong to deceased.
4. The timber item B was slightly stained with human blood group B belong to the deceased
5. There were no bloodstains on any of the knives items C and D.

From his findings, he noted that the blood stains on the blouse (A1), on the shirt (B1) and the timber B marched in group the blood sample of the deceased - B.

Based on the said finding, he formed the opinion that the blood stains could have come from the deceased after injury. He prepared the report dated 9<sup>th</sup> March, 2005, which he produced as Exhibit 1.

*Retired Inspector Edward Kamande Mburu, (PW10)*, was instructed by the DCIO Kiambu to proceed to Githunguri Police Station and take over a case of murder from the OCS. In company of the OCS aforesaid and Scenes of Crime personnel, the team proceeded to Gakoe village. On arrival he observed that the scene had been interfered with. The blood stains splashed on the floor had been washed. On further enquiry, he was told that the OCS Githunguri Police Station had earlier on visited the scene and collected some items; two knives and a bloodstained piece of wood. The other items were still at the scene. These included:-

1. Item A1 – Cream/green/spotted blouse.
2. Item A2 – a piece of timber.
3. Item B1 – blue/white/brown – short sleeved stripped shirt.
4. Item C – Kitchen –knife.
5. Item D – Kitchen – knife.
6. Item F – Blood sample of the deceased.

After investigations he arrived at a conclusion that the son and the daughter of the accused, sleeping

under the same roof with the parents, were not connected with the crime. He prepared the charge sheet against the accused and sent it to the Attorney General together with the file for further instructions. The same was returned later with a directive that the accused be charged with the offence of murder.

*Dr. Jane Wasike Simiyu (PW11)*, a pathologist working with Public Health Laboratories, deployed at the City Mortuary, performed postmortem on the body of the deceased on 16<sup>th</sup> February, 2004 at the City Mortuary. As a result of her examination, she formed the opinion that the cause of death was a penetrating chest injury by a sharp object. She filled the post mortem form which she produced as Exhibit 7.

In her sworn statement, the accused testified that on 7<sup>th</sup> February, 2004 the deceased had not slept at home. It was Saturday. The 8<sup>th</sup> day of February, 2004 was a Sunday. After undertaking household chores she went to church with her daughter Mary Ngendo and sons Fredrick and Stephen.

She came back from church and prepared lunch. In the evening at about 7.30 pm she prepared supper. Her husband had not shown up yet. David (PW7) her brother-in-law came to watch football on television at their house. David stayed until the match was over. On enquiry, by David, she disclosed that the accused had slept outside and was not yet back. David asked her to call the deceased on her mobile phone. She obliged. The deceased told her that she was at Kiamaiko taking beer and would come home later. She told the deceased that in fact it was David who wanted to talk to him. She relayed the information to David who continued watching football. (David was not called to give evidence either by the defence or the accused.)

She asked her youngest son Stephen to retire to bed since he would be going to school in the morning. She remained with David, her daughter Mary Ngendo and son Fredrick watching football. When the match ended David went to his house. Fredrick went to his usual sleeping place, outside the family house. Mary Ngendo retired to her bedroom within the family house which they shared with Stephen. That was the only bedroom in the house other than the couple's bedroom. About midnight, the deceased arrived and opened the main door from inside using his hand. She heard him coming to the bedroom. The deceased then sat on the bed and removed his clothes and got inside the bed. They talked for sometime then slept. That night they did not enjoy sex. After a short time, she heard some movement in the verandah. The deceased told her to go and check. She got out of the bed and proceeded to the living room. She noticed some light on the verandah. She proceeded to the door connecting the living room with the verandah. Somebody then pushed the door towards inside. The intruder wanted to come in. That person was holding a torch. She was hiding behind the door. She sensed danger. She then squatted behind the sofa set. The intruder switched off the torch. The door was ajar. Her instinct told her to seek help. She ran outside the house screaming loudly that the family was under attack. After a short time her brother-in-law, Lawrence (PW2) and his wife Lucy who were close neighbours responded. Lawrence told her and Lucy to wait outside the house as he (Lawrence) ventured into the house. By this time most of their neighbours had arrived. The crowd kept on swelling. She saw her husband being assisted into a taxi. She ran towards the vehicle carrying the deceased but she was blocked by her brother-in-law, Samuel (PW6). The vehicle then left without her.

Another brother-in-law, John (PW4), asked her son, Fredrick, to wipe the bloodstains on the floor of the bedroom. The younger son, Stephen, was still sleeping in the bedroom inside the main house the commotion notwithstanding.

A while later Lawrence, one of the good Samaritans who had taken the deceased to hospital, came back with the person who introduced herself as the OCS Githunguri Police Station. She was told to accompany the OCS. On reaching Githunguri Police Station she was locked in cells at 5.30 a.m. on 9<sup>th</sup> February, 2004. In the morning she again accompanied the OCS to her home and a search was conducted in the house in her presence. Later on 11<sup>th</sup> March, 2004 she was charged in court with the offence of murder of her husband.

Against that backdrop of evidence, it is clear to me that on Saturday night of 7<sup>th</sup> February, 2004, the

deceased did not sleep at his home. He was away the whole day on Sunday 8<sup>th</sup>. He arrived home slightly after midnight on 9<sup>th</sup> February, 2004. The accused had talked to him on mobile phone on the night of 8<sup>th</sup> February, 2004. He promised to return home the same night. He kept his word. When he arrived on the night of 9<sup>th</sup> February, 2004 all their three children had slept. Nobody knows, apart from the accused, what happened after his arrival. However, according to the accused, she heard the deceased opening the door from inside using his hand. She heard him coming inside the bedroom. The deceased then sat on the bed and removed his clothes and got inside the bed. They talked for some time and then slept.

A short while later, she heard some strange movement in the verandah inside the house. The deceased told her to go and check. She obliged. She saw some light on the verandah. As she proceeded to the door connecting the living room with the verandah somebody pushed the door inside. The intruder wanted to come inside the house. The person was holding a torch. She hid behind the door. On sensing danger she squatted behind the sofa-set. At that point in time the intruder switched off the torch. The door was then ajar. Instinct told her to seek help. She went outside the house screaming loudly. Her screams attracted her brother-in-law Lawrence and his wife Lucy. The deceased was then discovered lying naked on the floor of the bedroom in a pool of blood. Nobody was seen leaving the house by the accused or the neighbours who responded to the distress call with alacrity.

PW2 the immediate neighbour of the couple arrived at the residence in 5 or so minutes. He was joined almost immediately by PW3 and PW4. In effect PW2, PW3 and PW4 arrived almost the same time. The accused told them there were thugs holed in the house. They entered the house and conducted search but in vain. They only found the deceased lying naked on the floor in the bedroom. Nobody was seen leaving the scene of crime by the accused or their neighbours. The couple's house consisted of two bedrooms; the couple's bedroom and children's bedroom. The children Mary Ngendo and Stephen Mwaura, sleeping in the only other bedroom, did not hear any movement in the verandah or house. The eldest child Fredrick was sleeping in a separate house from the parents. He too did not hear any movement. The couple's house had only one single door leading from outside. The thug or thugs, whoever he was/they were, could only pass through the same one door and meet the accused who was already outside and PW2, PW3 and PW4 who come immediately in response to the distress call. Moreover the children, Mary Ngendo and Stephen Mwaura, who were sleeping under the same roof did not hear any movement in the house. Immediately the deceased was taken to the hospital, the scene of crime, was washed by the eldest son Fredrick. Apart from the accused, the only two persons present in the house were the daughter and son of the couple. According to the accused the two children were reportedly asleep. The daughter, Mary Ngendo was over 20 years. She was a grown up. Interestingly, she heard no commotion. By strange coincidence she did not give evidence for the prosecution or for the defence.

On the evidence on record, it is clear to me that the case turns on circumstantial evidence since there is no eyewitness, apart from the accused. The circumstances which the prosecution set out to piece together, which they placed before me, as circumstantial evidence connecting the accused with the death of the deceased, so far as is discernible, on the evidence, may be summarized thus:

1. The deceased used to drink at Kiamaiko and was in the habit of coming home late on occasions (see the evidence of PW1). This invariably caused friction between the couple. The night of 7<sup>th</sup> February, 2004 the deceased did not come back home – he slept outside the matrimonial home.
2. On the night of 8<sup>th</sup> February, 2004 the accused called the deceased on mobile phone. Deceased told her that he was at Kiamaiko trading Centre drinking alcohol but confirmed that he would come back home that night (see defence case).
3. PW1, as usual, ferried the deceased from his drinking den – Kiamaiko- to his matrimonial home on the night of 8<sup>th</sup> February, 2004. Estimated time was 11.30 p.m. (see evidence of PW1)
4. According to sworn statement of the accused the deceased, opened the door himself from inside, entered the bedroom, sat on the bed, removed his clothes, talked briefly with accused and both retired to

bed.

5. The couple did not enjoy sex, that night, despite the fact that he was away the night before (7<sup>th</sup> February, 2004). [See Re-examination and question put to accused by the court pursuant to section 173 of the Evidence Act.]

6. Slightly past midnight, on 9<sup>th</sup> February, 2004 the neighbours PW2, PW3, PW4, PW6 and PW7 were awakened by screams of the accused. She was claiming that the family had been invaded by thugs.

7. The only other people in the house, apart from the accused and deceased were 20 year old Mary Ngendo (daughter) and Stephen Mwaura (youngest son). The two children, according to accused, neither woke up nor heard any commotion. There is no evidence that they had a grudge with the deceased.

8. The accused did not take it kindly the fact that the accused had slept outside the matrimonial home. This is borne out by the accused calling the deceased on mobile phone on the night of 8<sup>th</sup> February, 2004. The deceased promised to come home. This brings out evidence of a grudge.

9. Though accused claims that it is David who wanted to talk to the deceased, that was not true. When deceased came on the line it was only the accused who talked to him.

10. The pathologist established that the deceased had been stabbed six times in the chest and that death had been caused by penetrating chest injury due to a sharp object.

11. That evidence of vicious attack can only be attributable to a person who had deep seated grudge against the deceased. On the evidence it is only the accused.

12. The blood stains on the accused green spotted blouse marked A was of group B of the deceased. That brings the issue of how she came into contact with blood group B yet she was outside the house at the time of attack.

13. There was no evidence of breakage or forceful entry into the house or theft at all.

14. The knife or sharp object used in attacking the deceased could have been one of the two kitchen knives. Marked C and D. The accused had ample opportunity to clean the same.

15. The two couples children Mary Ngendo over 20 years and Stephen Mwaura the youngest – never heard any commotion and never gave evidence for the accused or the defence.

Against that backdrop of events, I am persuaded that the idea of invasion by thugs was really a red-herring. If the thug or thugs entered the house, PW2, PW3 could have met them in the house having arrived immediately in answer to the distress call. Even the accused could have seen the thug, or thugs who were said to be holed inside the house. In my view it is the accused who stabbed the deceased. The motive is discernible from the anger generated by the deceased's frequent habit of sleeping outside the matrimonial home. Means is provided by the fact that she knew where to get the knife or knives, how to open all the doors and close them. Equally how to conceal the murder weapon by cleaning the same. The opportunity is provided by the fact that the children had slept and she was alone in the bedroom with the deceased who was drunk. She could also control the children whether to give or not to give the evidence.

The deceased was stabbed six times in the chest. By such vicious attack malice-aforethought as defined in Section 206 of the Penal Code was thus proved. The pathologist proved that death occurred due to penetrating chest injury. Thus both *actus-reus* and malice aforethought coincided in point of time and was proved beyond reasonable doubt.

In the result, I am persuaded that the accused with malice aforethought caused the death of the deceased on the night of 8<sup>th</sup> and 9<sup>th</sup> February, 2004. Although there was no eye witness account of what actually

happened, the circumstantial evidence adduced is inconsistent with the innocence of the accused and incapable explanation on any other hypothesis other than that of guilt. It proved the case against the accused with the accuracy of mathematics.

Only the accused, apart from his two children who were asleep, was present when the deceased was stabbed. While the accused was in the same room with the deceased, the children were in another room. While the accused had a grudge against the deceased, there is no evidence that the children had any grudge against their father.

In the circumstances as to who stabbed the deceased was a fact specifically within knowledge of the accused. Only the accused could explain specifically who stabbed the deceased. The accused sworn statement does not appear to me to discharge the burden squarely put on her under section 111 (1) of the Evidence Act of proving circumstances which would exonerate her from blame. In doing so, I have not lost sight of the provision of section 111 (2) of the Evidence Act which in effect provides that section 111 (1), does not diminish the obligation on the prosecution to establish by evidence the commission of the offence charged. It is within this in mind that I said that the evidence against the accused is wholly circumstantial.

All the three assessors entered a verdict of guilty. I am in complete agreement with them. I find the accused guilty of murder. I too enter a verdict of GUILTY. Accordingly, I sentence the accused to suffer death as provided by the law. Right of Appeal 14 days.

Dated and delivered at Nairobi this 28<sup>th</sup> day of March, 2008.

**N.R.O. OMBIJA.**

**JUDGE.**