



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

Criminal Case 111 of 2005

REPUBLIC.....APPLICANT

-VS-

JOHN NDUNDA MWANIKI.....RESPONDENT

JUDGMENT

The accused has been charged for the offence of murder, contrary to Section 203 as read with Section 204 of the Penal Code, Cap 63, Laws of Kenya

particulars of the offence as stated in the information are as follows:

“On the 4th August 2005 along Muyuyu Road Eastleigh in Nairobi within Nairobi area, murdered Bernice Mutindi Makenga.

In his evidence, the PW1 Francis Thuo Kibathi informed the court that he has known the deceased who was a store-keeper for the last four years since they had worked together at the Kenya National Trading Corporation. The PW1 recalled that on the 4th August, 2005 he was on duty with the deceased and he left work at around 5.15 p.m. On the following day, the PW1 reported on duty at around 7.45 am and was shocked to find that the store had not been opened. Subsequently, at around 8.00 a.m. the PW1 rang the deceased through her mobile phone but the call went into the voice mail. After trying again on several occasions in vain, the PW1 sent Paul Musyoka to the house of the deceased at 9.30 a.m. On his return, Musyoka explained that the neighbours had told him that the deceased had not been seen since the previous day. On 8th August, 2005, the PW1 informed his bosses who advised him to alert the relatives of the deceased about the disappearance. On the following day, the sister to the deceased viz, Judy Murwa and her husband viz, Mutau went to the office of the PW1 and he explained to them about the absence of the deceased. Though the two relatives visited all the police stations in Nairobi, they never traced their sister. In addition to the above, the PW1 stated that on 1st September, 2005 while he was watching KTN news around 9.00 p.m. he saw a woman being removed from below a kiosk in Eastleigh. Besides the above, the news bulletin also showed the deceased’s sisters crying. Apart from the above, the KTN also showed the photo of Bernice and informed their viewers that the deceased was working with Kenya National Trading Corporation. On the following day, Judy with her sister and husband informed the PW1 that the deceased had been killed by her worker. In her evidence, the PW2 Anastasia Siku, a sister to the deceased, recalled that on 8th August, 2005 at around 5.00 p.m. she received a call from Angelica who complained that the deceased had not reported on duty from 5th August, 2005. In response, the PW2 rang her younger sister viz, Judy Mulwa and told her to go and find out whether Bernice was in her house. At around 6.30 p.m., Judy rang the PW2 and explained that though she had gone to the house of Bernice, she never found her. The PW2 was also informed that when Judy went to the kiosk belonging

to her sister, she was informed by the worker that she had been last seen there on 4th August, 2005 at around 8.00 p.m. On 9th August, 2005 the PW2 reported the matter at Pangani Police Station and CID headquarters. The PW2 further explained that on 12th August, 2005 they advertised in the “Daily Nation” newspaper about the disappearance of the deceased. Apart from the above, the PW2 also explained how she had gone in vain to look for her sister at Buru Buru, Makongeni, Shauri Moyo Police stations and City Mortuary, Kenyatta National Hospital and Nairobi Hospital. Further to the above, the PW2 also explained that on 10th & 11th August, 2005 she went to her sister’s kiosk and the accused explained that he had observed that the deceased had bought two suitcases and that he suspected that she had gone on safari without telling anybody. Surprisingly, on 23rd August, 2005 the PW2 rang the mobile phone of the deceased and found that the same was engaged. Subsequently, the PW2 was informed by somebody from safaricom that the SIM card to the deceased’s phone had been destroyed but the handset was being used by a Somali in Eastleigh. On 31st August, 2005, the PW2 was rang by her sister viz, Judy who informed her that the deceased’s worker viz, John Ndunda Mwaniki had been arrested in connection with a stolen mobile phone. On 1st September, 2005, the PW2 and other relatives went to the kiosk at around 6.30am and found that the same was being guarded by three police officers. The PW2 conceded that while at the kiosk she could smell a dead body. At around 10.00 a.m. Pastor Mitau informed the PW2 that the accused had killed the deceased and buried her in the kiosk. Later at around 4.30 p.m. the City mortuary attendants went to the kiosk and exhumed the body of the deceased which the PW2 recognized despite the fact that the face had turned pink while one of her hands had decomposed. Apart from the above, the PW2 also stated that on 6th September, 2005 they visited the kiosk where they recovered the following:

Ø Handbag – Ex.2, a small purse, bunch of keys – Ex.3, one ear ring, inner-pant, byca, a bunch of counter-feit KShs.200/= notes, metal bar and a mattock – Ex.4.

On 8th September, 2005, the PW2, Judy and her husband went and identified the body of the deceased at the City Mortuary before the post-mortem was conducted. On the other hand, the PW3 Judith Kambua Mulwa elder sister to the deceased, recalled that on 8th August, 2005 she received a phone call from the PW2 that Bernice had not reported on duty since 4th August, 2005. On going to the house of her sister, the PW3 found that the same had been locked by a padlock. Subsequently, the PW3 borrowed a stool and on climbing the same never saw the deceased in her room. From there, the PW3 went to the deceased’s kiosk where the accused claimed that he had not seen her sister from 4th August, 2005. On 9th August, 2005, the PW3, her husband and the PW2 went to the KNTC offices where the PW1 informed them that the deceased had left work as usual on 4th August, 2005. The PW3 also informed the court that on 31st August, 2005 her husband informed them that the accused had been arrested while in possession of a stolen mobile phone. On 1st September, 2005 the PW3 was also present when mortuary attendants and police officers exhumed the body of her sister. On 6th September, 2005 the PW3 accompanied Inspector Ndirangu to the scene where they recovered.

Ø A handbag – Ex.1 , a small pouch, a pair of shoes – Ex.2, inner pant, a byca, one ear ring, a wrist watch – Ex.6 and fake notes of KShs.200/- denominations. In his evidence, the PW4 – Pastor Isaac Mulwa Mitau who is a brother-in-law to the deceased confirmed and corroborated in details, the story of his wife, the PW3 –Judith Kambua Mulwa. On 23rd August, 2005 the PW4 went to see Joseph Musyoki who works with Safaricom. On checking the computer Musyoki found out that the deceased’s handset was being used by one Ahmed. On 1st September, 2005 the PW4 was present when t

Ø he body of the deceased was exhumed before being taken to the City Mortuary. On the other hand, the PW5 Mustafa Mahmoud Abdille explained how Mohat Ali Ahmed had bought a phone and had handed over the same to him. He admitted that on 31st August, 2005 he handed over the cell phone to Mahat who had been accompanied by police officers. In turn, Mahat handed over the cell phone to the police officers. In his evidence, the PW6 Mohat Ali Ahmed explained how he had bought a Samsung mobile phone from the accused at a price of KShs.2,500/- and later inserted his own SIM card. The PW6 later admitted having handed over the cell phone to the PW5. On being questioned by the police, the PW6 conceded that he had bought the cell phone from the accused. In his evidence, the PW7 PC Frasto

Onyambu Gesengi confirmed and corroborated the story of the PW6. On her part, the PW8 (Mrs) Grace Nzioka, Principal Magistrate, Makadara recalled that on 12th September, 2005 the accused was taken to her for purposes of recording his confession. On talking to the accused, the latter confirmed that he wanted to make a voluntary confession. In response, the PW8 explained to the accused his rights and administered an oath before recording the confession. Eventually, the PW8 read over the confession to the accused who later signed before she counter-signed. Ultimately, the PW8 gave a certificate that the accused was in good health and that he had given the confession voluntarily. In his evidence, the PW9 Sgt. Martin Mwaka confirmed that he had taken sixteen photographs and also prepared a report – Ex.2 & 3 respectively. On his part, the PW10 – CPL Nehemiah Ndirangu recalled that on 24th August, 2005 he received a report of a missing person. Subsequently, the PW10 recalled that Insp. Wainaina called the number and the user of the mobile phone and he led them to the accused whom they arrested. Apart from the above, the PW10 explained that the accused subsequently led them to the scene where he showed the police officers the secret grave where he had buried the deceased. In addition to the above, the PW10 narrated that on the following day, they exhumed the body of the deceased in the presence of the print and electronic media. Subsequently, the accused led the PW10 inside the kiosk where he retrieved a metal object under the bed and explained that he had used the same to hit the deceased on the head. That apart, the PW10 also explained that the accused also retrieved a mattock under the bed and explained that he had used the same to dig the shallow grave. After a week, the PW10 revisited the scene where they recovered the following:

Ø a handbag, a pair of shoes

Ø a wrist-watch, a pant and a byca.

In his medical evidence, Dr. Moses Njue Gachoki testified that on 8th September, 2005 he performed an autopsy on the body of Bernice Mutindi Makenga. According to Dr. Njue, the body of the deceased was moderately decomposed and that she had a bruise on the left forehead and a depressed fracture of the head involving the parietal area and the scalp. Apart from the above, he also observed that the deceased had a rugged injury at the back of the head that indicated that the force used was blunt. Dr. Njue was of the opinion that the injuries must have occurred before death. He also observed that the brain was completely decomposed and that the maximum impact was from the temporal area. Dr. Njue concluded that the cause of death was head injury caused by a blunt weapon on the head. On the other hand, the PW12 – Dr. Zephania Mwangi Kamau examined the accused on 10th September, 2005 and found him to be mentally fit. During the examination, Dr. Kamau never found any physical injuries on the accused. In his evidence, the PW13 Inspector John Wainaina confirmed and corroborated the evidence of the PW10 in details.

In his defence, the accused explained at length how he was employed by the deceased through his aunt. After the accused started working for the deceased, she showed him where to buy stocks of cereals and fruits. The accused recalled that on 25th October, 2003, the deceased found him a house at Mlango Kubwa, Eastleigh and advised him to move away from Garden Estate where he was staying with his aunt. Consequently, on 6th March, 2004, the deceased introduced him her sisters – Anne and Judy. The deceased later explained that the sisters would be visiting him regularly at the kiosk. That apart, the accused stated that on 30th July, 2005, the deceased went to the kiosk and balanced the accounts before she left. He also recalled that on 9th August, 2005 the two sisters went and asked for the whereabouts of the deceased since she was missing from both her home and office. In response, the accused explained that he had last seen the deceased on 30th July, 2005. According to the accused, Ann and Judy went to the kiosk on 13th August, 2005 and informed him that they had broken into the house of Bernice and got cash KShs.8,000/= which they wanted him to buy fresh stock. Besides the above, the accused further explained that thereafter, the two sisters kept on coming regularly and complained that Bernice could not be traced. On 31st August, 2005, the accused was arrested and placed in a Range Rover where he found two Somalis before they were taken to Kasarani Police Station. According to the accused, he was later taken to a different office where he was interrogated and later taken to a forest where he was tortured upto 5th September, 2005 and subsequently on 10th September, 2005 he was taken to the hospital belonging to

the GSU. That apart, the accused reckoned that he was later taken to the CID and forced to sign some papers that had already been written. The accused concluded his defence by stating that he had never quarreled with the deceased.

After the court had read the summing-up, all the three assessors returned a unanimous verdict of “guilty” against the accused. At the outset, it is apparent that none of the prosecution witnesses actually saw the accused killing the deceased. The prosecution case entirely relied on both the confession and the circumstantial evidence. At the outset, it is apparent that the police were only able to unravel the offence following the fact that deceased’s cell phone was traced to the PW5 – Mustafa Mahmoud Abille. He in turn explained that he had been given the said cell phone by PW6 – Mahat Ali Ahmed. After the police got hold of the latter, he led them to the accused. When the accused was interrogated he explained in details what had transpired. Significantly, the accused confessed committing the offence to the PW8 (Mrs) Grace Nzioka who was by then the Principal Magistrate, Makadara. According to the accused, he had a triangle love relationship that involved himself, the deceased and a Somali girl called Nima. The accused also narrated how he had been caught red-handed with Nima on two different occasions when they were having sex. It was during the second occasion that the accused hit the deceased with an iron-bar on the head. The accused explained that he had hit the deceased since she had abused him and also talked to him harshly.

Significantly, Mrs Grace Nzioka was not a party to the case and had no interest whatsoever. The court believes her that the accused recorded the statement voluntarily and without any force. The post-mortem by Dr. Njue stated that the deceased had the following injuries:

- Ø bruise over the left forehead
- Ø depression fracture left temporal parietal
- Ø laceration of the occiput.

During the cross-examination, Dr. Njue stated that there was maximum force that was used on the head – and that he found three injuries on the head. He also added that the blow inflicted must have torn the brain. From the force used and the weapon that the accused opted to deploy, it was apparent that he intended to kill the deceased or cause grievous bodily harm. Apparently the accused succeeded in achieving his first objective. The accused never made any attempts whatsoever to help the deceased get any medical treatment after the incident. Apart from the above overwhelming evidence, the accused deliberately sold the cell phone of the deceased. Unfortunately, that was to be his undoing since modern technology can trace use of a particular cell phone even when the SIM card has been changed or destroyed. Instead of covering his tracks, the recovery of the cell phone led to his arrest. Lastly, the fact that the accused buried the deceased before she had been medically certified dead showed that he had a guilty conscience and also wanted to ensure the death of the deceased.

Having carefully considered the defence case, I find that the same has no merits and does not ring true at all. Significantly, the accused never impressed the court to be a truthful and straight forward person. In view of the above, I hereby dismiss the defence case. The evidence against the accused is simply overwhelming and water-tight. The upshot is that the prosecution has proved its case beyond any reasonable doubt. The accused is found “guilty” of the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. That means that I do concur with the verdict of all the three assessors. Given the clear position of the law and total circumstances of the case, I hereby sentence the accused to death. Right of appeal explained.

Order: Assessors to be paid allowances for 2 days.

MUGA APONDI,

JUDGE.

Judgment read signed and delivered in open Court in the presence of the accused Mr. Kanyangi Defence Counsel and Mr. Ndemmo Advocate.

MUGA APONDI,

JUDGE.

31ST JANUARY, 2007.