



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NYERI

Criminal Case 16 of 2005

REPUBLIC.....PROSECUTOR

VERSUS

MOSES GITONGA MACHARIA.....ACCUSED

J U D G M E N T

Moses Gitonga Macharia (*hereinafter referred to as the Accused*) is arraigned before this court charged with the offence of murder contrary to *Section 203* as read with *Section 204* of the Penal Code. It is alleged that on the night of 11th and 12th May 2005 in Nyeri Township within Nyeri District in Central Province He murdered Margaret Muthoni Thiong'o (*hereinafter referred to as the deceased*). This being a criminal case, the burden is entirely upon the prosecution to prove beyond reasonable doubt that the Accused did commit the offence. If there is any doubt the benefit must go to the Accused who must then be acquitted.

Sixteen witnesses testified on behalf of the prosecution, whilst the Accused gave a sworn testimony in his defence.

The Prosecution evidence is that on the night of 11th May 2005, the deceased who was a frequent customer at South Tetu Bar and Restaurant in Nyeri was spotted in the company of a man who was later identified by various witnesses as the accused person. These witnesses included Bernard Kinyua Mwangi (P.W.3) an accountant cum Manager at the Restaurant, who noticed the deceased and the Accused seated opposite him in the Bar, and swore that he had a good look at the Accused when the deceased removed the Accused's cap. Alice Wanjiru Mureithi (P.W.4) a Bar attendant then working at South Tetu Bar and Restaurant who recalled selling a packet of condoms to the deceased and later saw the deceased in the company of the Accused at the Karimi Bar within South Tetu Bar where she served them. Karen Njeri Wahome (P.W.6) who found the deceased and Accused on the material night drinking at South Tetu Bar, and remained in the Bar for about an hour after which P.W.6 left leaving the deceased and Accused who had moved from the ground floor bar to the upper floor bar; Thomas Owino Otieno (P.W.9) then working as a watchman at the bar who also recalled seeing the deceased in the company of a man whom he identified in court as the Accused. Theresa Nduta Gichuhi (P.W.5) a room attendant at South Tetu Bar who identified the Accused as the man who requested for a room on the material night and was assigned room Number 12 and noted that the Accused was in the company of the deceased. All these witnesses noted that the Accused had a shiny or glittering tooth, and a mark at the back of his head, some also noticed that there was something peculiar about the Accused's ears.

On the morning of 12th May 2005, at about 7.10 a.m., P.W.9 saw the Accused leaving the hotel. At

around 8.00 a.m., P.W.5 and one Helen another workmate were in the process of changing the beddings in the rooms when they went to room Number 12. They knocked several times but there was no response. Upon opening the door they found the deceased lying dead on the bed. The matter was reported to P.W.3 who called the police. Chief Inspector Joseph Choyo (P.W.11) who was then the Ag. O.C.S. Nyeri Police Station proceeded to the scene accompanied by other officers. They observed the body of the deceased. They also noticed used condoms. Cpl. John Mugo (P.W.2) from the crime scene support services was called and he took several photographs of the scene showing different views. The body was thereafter escorted to Nyeri Provincial General Hospital Mortuary. Some exhibits including bedding clothings and condoms were collected from the scene by Cpl. Martin Mureithi Muremi (P.W.15).

On the 19th May 2005 Dr. Andrew Kamau Ndaru (P.W.1) performed a postmortem examination on the body of the deceased which was identified to him by the deceased's brother Charles Maina Ndiga (P.W.10) and the deceased's father. Dr. Kamau observed amongst other things that all the tracheal rings in the respiratory system were all crushed, the muscle on the neck and fat tissue bruised and the muscles on the chest also bruised, and that there was collection of blood on the right lung cavity. Dr. Kamau Ndaru formed the opinion that the cause of death was asphyxia due to strangulation. Blood sample from the body of the deceased and the Accused as well as several other items collected from the scene were forwarded to the government chemist for examination. The report of the government analyst which was produced through P.W.15 showed that the examination did not yield any useful results.

On the 8th June 2005, at around 6.00 a.m. Caroline Nyambura King'ori (P.W.12) was at seven stars bar when the accused made advances towards her and offered to buy her a drink. As a result of information P.W.12 received from one P.W.6, P.W.12 went to South Tetu Bar and alerted P.W.9. P.W.9 went to Seven Stars Bar and confirmed that the man who had offered P.W.12 a drink was the same person who had been with the deceased on the night of her murder. P.W.9 sought assistance from P.C. Ruto Mutahi (P.W.14) who was at Seven Stars Bar at the material time. Together they apprehended the Accused and escorted him to Nyeri Police Station. P.W.12, P.W.9 and P.W.14 all noted that at the time of his apprehension the Accused had a silvery or shiny tooth. However by the time they arrived at the police station, the shiny/silvery tooth was no longer visible.

On the 9th June 2005 Inspector David Cheruiyot (P.W.8) conducted two identification parades within the corridors of Nyeri Police Station cells. During the first identification parade, the Accused who was the suspect was identified by 4 of the identifying witnesses who were P.W.3, P.W.12, one Erastus Karuoya Mutahi and Alice Wanjira Kuria, whilst P.W.4 failed to identify the accused. In the second identification parade P.W.6 failed to identify the Accused whilst P.W.9 identified him.

On the 10th June 2005 Inspector Gerald Mwangi (P.W.13) carried out another identification parade during which P.W.5 and one Robert Maranga Ongaro identified the Accused as the suspect.

On 14th June 2005, the Accused was examined by Dr. Abraham Gatangi who confirmed that Accused was physically and mentally normal. The Accused was subsequently charged.

The Accused person has given a sworn statement in which He has denied all the allegations made against Him. He maintained that He spent the night of 11th and 12th May 2005 at his home in Itemere in Nyeri Municipality and that there was nothing eventful on that night.

He explained that He was arrested from Seven Stars Bar on the morning of 9th June 2005. He was drunk at the time of His arrest, but recall having beaten up a woman who had stolen Kshs.400/= from Him. He claimed that He has never gone to South Tetu Bar and maintained that He has never had any shiny tooth. He maintained that the woman He was arrested for having beaten was P.W.6. He denied being a free mason. He also denied having killed any woman, and alleged that the case against Him was a total frame up.

In his submissions the advocate for the Accused submitted that the evidence which has been adduced against the Accused is not sufficient to sustain a conviction as the evidence regarding identification was

wanting, and that the forensic evidence did not link the Accused with the offence. The counsel submitted that the *alibi* of the Accused that He spent the night of 11th and 12th May 2005 at his home in Itemere has not been dislodged by the prosecution.

It is apparent from the evidence which was adduced by the prosecution that the deceased was seen at South Tetu Bar while she was in the company of a man. This was testified to by P.W.3, P.W.4, P.W.5 and P.W.6 all of whom knew the deceased well. P.W.4 recalled that the Deceased had earlier purchased a packet of condoms from her and informed P.W.4 that She was going to look for a customer. P.W.5 also recalled seeing the deceased in the company of a man to whom she let out Room Number 12. This is the Room in which the deceased's body was later found. Dr. Kamau Ndaru who performed post mortem examination on the body of the deceased was of the opinion that the deceased died as a result of asphyxia due to strangulation. The fact that the body of the deceased was naked on the lower part, the presence of the used condom in the room and the bruising of the anterior wall of the vagina are all an indication that sexual intercourse had taken place.

I have no doubt that the deceased was a commercial sex worker and willingly accompanied her companion to Room Number 12 for the purposes of having sexual intercourse. From the circumstances it is evident that the deceased was strangled by the person whom she accompanied to Room Number 12. The question is whether the Accused person was positively identified as the person who was in the company of the deceased. The Accused has denied ever having visited South Tetu Bar or having been with the deceased. He maintains that on the material night He was at his house in Itemere within Nyeri Municipality. Thus the Accused has raised the defence of an *alibi* and it is upon the prosecution to dislodge this defence.

Although P.W.3, P.W.4, P.W.5, P.W.6 and P.W.9 all testified that they saw the deceased person in the company of the Accused, P.W.4 and P.W.6 were not able to identify the Accused person during the Identification Parade. According to P.W.4 she had served many people that night and could only have identified the Accused through the glittering tooth which Accused did not have during the Identification Parade. This then means that the dock identification by P.W.4 was not of much assistance as she could not positively identify the Accused given that Accused was not spotting this feature whilst in court.

As regards P.W.6, She claims that while she did recognize the Accused at the Identification Parade She did not identify him because She was scared of him. The explanation of P.W.6 is not very convincing given that the Accused person was in custody and She was under the protection of the police. Moreover from the evidence of P.W.6 her contact with the companion of the deceased on the fateful night was very fleeting and that would explain her uncertainty.

P.W.3, P.W.5 and P.W.9 each positively identified the Accused person at the Identification Parade as the person who was in the company of the deceased on the fateful night. P.W.3 explained clearly how He had the opportunity to observe the man and gave a clear description that the man had a mark at the back of his head, a goldish tooth and peculiar ears.

This was an accountant cum Manager at the South Tetu Bar and it is understandable that He would take an interest in the customers patroning the Bar. I believe and accept the evidence of P.W.3 that the Accused person was the same person He saw in the company of the deceased on the night that the deceased was murdered.

P.W.5 also identified the Accused person at the Identification Parade as the person who was with the deceased and to whom She rent out Room Number 12. Again this witness was in close proximity with the person at the time She took them to the room. She therefore had the opportunity to observe the person and also noticed that He had a shiny false tooth and a mark at the back of his head, his ears were peculiar and that his head was clean shaven.

Although the witness appeared quite positive and certain in her identification two things raise "a red flag" in so far as her evidence is concerned. First She claimed that She was able to identify the Accused with the false tooth. However all witnesses conceded that although the Accused spotted a shiny or

glittering tooth at the time He was with the deceased and the time of his arrest by the time he arrived at the Police Station, neither the glittering tooth was present nor did the Accused have any false tooth. The evidence of P.W.5 was thus contradicted in this regard.

Secondly P.W.5 admitted that in her statement to the police She claimed that She had never seen the deceased or her companion before, and yet in her evidence before court She conceded that the deceased was known to her. Thus it is evident that P.W.5 either deliberately lied to the police or withheld information. The evidence of P.W.5 therefore needs to be treated with utmost caution.

The other witness who successfully identified the Accused at the Identification Parade was P.W.9. This was a watchman at South Tetu Bar. He explained how He came into contact with the Accused at the Bar and how He observed the movements of Accused and the deceased. He also gave a description of the Accused which was similar to that given by other identifying witnesses. It is evident that some witnesses described the glittering tooth as silvery and other as goldish. In my view this was not a material contradiction as the purport of the evidence was that the person had a shiny or glittering tooth.

Although the witnesses initially described the tooth as a false tooth, it is apparent from the evidence of P.W.9 and P.W.14, that it was just something glittering which the Accused was apparently able to get rid off between the time of his arrest and his arrival at the police station. I notice that P.W.9 who was one of the witnesses who identified the Accused person, participated in his arrest and even escorted the Accused person to the police station. Under these circumstances the identification parade was not useful in so far as P.W.9 was concerned as He had already identified the Accused and facilitated his arrest. I was nevertheless impressed by the evidence of P.W.9 who struck me as a hawk eyed watchman who even noticed the Accused person leaving the Bar the next morning. The evidence of P.W.9 taken together with that of P.W.3 leaves me in no doubt that the Accused was the person who was in company of the deceased, and that He was the same person to whom P.W.5 hired out Room Number 12. I therefore reject the *alibi* of the Accused person and find that He was indeed present at South Tetu Bar on the night of 11th and 12th May 2005 and retired into Room Number 12 with the deceased. The body of the deceased was recovered in the same room the next morning after the Accused had been seen leaving the Bar, the circumstances point irresistibly to the Accused person having been the one who strangled the deceased.

There is no evidence of any motive on the part of the Accused to cause the death of the deceased. The circumstances in which the deceased was killed however leave no doubt that death was intended and malice aforethought must therefore be inferred.

I therefore concur with the unanimous opinion of the Assessors and do find the Accused person guilty of the offence of murder. I convict him of the same under **Section 322 (3)** of the Criminal Procedure Code.

Dated, signed and delivered this 20th day of July 2007.

H. M. OKWENGU

JUDGE