



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

Criminal Case 39 of 2005

REPUBLIC PROSECUTOR

Versus

LIADAH KARIUKI NDEGWA *Alias* NEWTON KARIUKI..... ACCUSED

J U D G M E N T

The accused, **Liadah Kariuki Ndegwa *alias* Newton Kariuki** has been arraigned before this court on an information filed by the Attorney General on behalf of the republic. The information is to the effect that the accused on 3rd September, 2005 at Muricho village, in Nyandarua District within Central Province murdered **Simon Muraya Muturi**. In a bid to prove the charge against the accused the prosecution led initially by **Mr. Mugwe**, learned state counsel and subsequently, by **Mr. Orinda**, learned principal state counsel lined up 7 witnesses. The trial as required was conducted with the assistance of three Assessors, to wit; **Jane Wangui Theuri, Francis Muthuri** and **Charity Gathima**.

The prosecution case simply put was that PW1, was the mother to the deceased. It was her testimony that he had employed the accused as her herdsman. The deceased, her son was aged about 10 years. On 3rd September 2005 at about 7.30 p.m. after dinner the accused persuaded the deceased to accompany him to a spot where the accused alleged that stranger(s) would routinely come and start raining stones on PW1's house. They wanted to mark the spot. Soon after the two left P.W.1 heard the deceased screaming and calling her out, "**waii mama**" which is a distress call. She also immediately heard and recognized the accused's voice telling the deceased "**uka na guku**" meaning "**come this way**". PW1 immediately ran towards the scene screaming as well. Her screams attracted neighbours including PW2 who responded and joined her in the search for both the accused and deceased. 50 to 80 meters away from the gate of PW1's house, PW1, PW2 and one **George** who also had joined PW1 & PW2 came across the lifeless body of the deceased which had been cut savagely on the head and neck. Besides the body, lay a knife and a panga. PW1 identified both the panga and knife as belonging to her. The following day an axe again belonging to PW1 was found a few metres from where the deceased had been killed by the Assistant chief of the area (PW3) and handed over to the police. The accused was nowhere to be seen. The matter was then reported to Ndaragwa police station by PW2 and the police commenced investigations. The body was removed from the scene by PW4 who then took it to Nyahururu District mortuary. A post mortem was conducted by **Dr. Mburu** who formed the opinion that the cause of death was cardio-pulmonary failure due to failure of the diaphragm functioning due to severed spinal code. The post mortem report was tendered in evidence by PW7 on behalf of **Dr. Mburu** who was said to have left Government employment in pursuit of post graduate studies. He tendered the post mortem under the provisions of *section 33 & 77* of the **Evidence Act**. Armed with the information that the accused was the last person to be seen with the deceased, PW4 started looking for him. The information it would appear had also been circulated at Muricho Chief's Camp, the location that the accused came from. Twenty days later the accused was arrested by PW5, an Administrative Police Officer at the said camp as he went there in pursuit of his national identity card. Apparently PW5 had been alerted of the accused possible

involvement in the death of the deceased.

Upon arrest, the accused was taken to Mweiga police station and was subsequently charged with the offence.

At the close of the prosecution case, the accused was found to have a case to answer and was accordingly put on his defence. In his unsworn statement of defence, the accused stated that he had been employed by PW1 in the year 2000 as a herdsman. On 3rd September 2005 at about 7 am after he had milked the cows and taken the milk to the dairy he asked his employer (PW1) for permission to travel home. The employer readily gave him the permission and he left for home in the morning on the same day where he stayed until 22/9/05. On 22/9/05 he proceeded to Mweiga AP's camp to collect his national identity card. It was then that he was arrested and charged with the instant offence. The accused maintained that when the offence was committed he was nowhere near the scene as he had left for his home with the permission of her employer (PW1). When he left for his home, he left behind the deceased with his mother alive.

Following the defence case, the submissions of **Mr. Kimani** learned counsel for the accused and **Mr. Orinda** for the state I summed up the case for the assessors as required. After retiring to consider their verdict for a day, their decision, which they rendered the following day was unanimous. They all found the accused guilty as charged.

Their decision was in summary informed by the following considerations:

- 1. They believed the evidence of PW1 and PW2 as it tallied in material particulars.**
- 2. They also considered the fact that the accused disappeared for 20 days on the day the deceased was murdered.**
- 3. That if the accused was innocent he could not have disappeared from his employer's home.**

On her part, the 1st assessor, **Jane Wangui Theuri** whilst agreeing with the joint verdict of the other assessors also added that it was strange coincidence that on the day the boy was killed is the day the accused is alleged to have taken leave. Further that, investigations done show that a report about the accused missing was made to the chief of the area. That the accused must have been aware that the police were looking for him and that is why he ran away. The 2nd Assessor apart from reading out the assessors' joint verdict in court had nothing else to add. The same goes for the 3rd assessor. I wholly agree and endorse the findings and or conclusions of the Assessors.

What are the issues for determination in this trial? To my mind they are basically two; whether the late **Simon Muraya Muturi** was murdered and if so by whom. On the first issue the answer should be fairly obvious. The young **Muturi** was murdered. There is the evidence of PW1 and PW2 who came across the lifeless body of the deceased 50 – 80 metres from the gate of PW1's house. The body had several cuts on the neck and the head. There was a knife and a panga presumably used in grisly attack abandoned next to the body. Shortly before then the deceased had been alive and had in fact had dinner with his mother (PW1). Then there is the evidence of PW4, a Police Officer who was attached to Ndaragwa Police Station who visited the scene of crime on the instructions of the O.C.S and collected the body of the deceased in the company of other police officers. He found a dead body in a pool of blood which body was identified to him by PW1 as belonging to her son. He took the body to Nyahururu District Hospital mortuary. PW6 who was the father of the deceased identified the body of the deceased at the

mortuary for purposes of post mortem. The body was of his deceased son. Indeed this witness attended the post mortem. Finally there is the evidence of PW7 who produced the post mortem report on behalf of **Dr. Mburu** who had conducted the same. The post mortem report established beyond reasonable doubt that the deceased was killed going by the severe injuries on the body of the deceased as noted by the **Dr. Mburu** in his post mortem and his opinion as to the cause of death in the same. All these evidence taken together leads to the irrisistable conclusion that the deceased was murdered.

Who then murdered him? The answer to this question will turn out on the credibility to be attached to the testimony of PW1, PW2 and the accused, as well as on circumstantial evidence and the Alibi defence advanced by the accused. On the credibility to be attached on the evidence of the two crucial witnesses; PW1, PW2 and the accused, I must hasten to state that I carefully observed both PW1 & PW2 as they testified. PW1 & PW2 struck me as honest and truthful witnesses. They were together as they searched for the deceased and accused. They testified in resonance, they were forth right, steady, calm and fully corroborating each other. Of course at some point PW1 broke down during her testimony. This was expected as she was testifying as to what she saw when she came across the lifeless body of her son whom she had just seen alive a while ago. I have no reason to doubt the testimony of these witnesses. Indeed PW2 who is a neighbour of PW1 was with her as they went about looking for the deceased and the accused. It was his evidence that he was informed by PW1 that the accused had left the house in the company of the accused and shortly thereafter she had heard the deceased calling her out and the accused ordering him around. He assisted PW1, in the search and recovery of the body of the deceased. He also confirmed that the accused was not present when they discovered the body. I have no reason to doubt the testimony of this witnesses as well. I believe the testimony of PW1 to the effect that it was the accused who was the last person to leave and to be seen with the deceased alive. I also believe the testimony of PW2 as to the search and eventual recovery of the body of the deceased.

The accused on the other hand gave unsworn statement in his testimony. There is nothing wrong with that though. However he did not strike me as candid, forthright and honest in his testimony. He was at times fidgety and I got the distinct impression that there was much more he knew about the deceased death than he was willing to tell the court. In the final analysis I would attach more weight and credibility to the evidence of PW1 and PW2 as opposed to the accused.

The accused left the house of PW1 in the company of the deceased soon after dinner allegedly to go and mark a place where strangers were stopping to throw stones at PW1's house. No sooner had they left than PW1 heard a distress call from her late son. She also simultaneously heard the accused ordering the deceased to "**come this way**" Apparently PW1 was familiar with the accused's voice having had him as her employee from the year 2000. Sensing that the two were in danger, PW1 ran towards the scene screaming, wailing and calling for help from the neighbours. PW2 immediately joined her in searching for both the accused and the deceased. Soon thereafter they came across the body of the deceased yet the accused who a few minutes earlier had left with the deceased was nowhere to be seen.

This is the circumstantial evidence linking the accused to the offence. I am aware that 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 accuracy of mathematics. To find a conviction exclusively upon circumstantial evidence however the inculpatory facts must be incompatible with the innocence of the deceased and incapable of explanation upon any other hypothesis than that of guilt. This was so stated in the case of **Simoni Musoke V Republic (1958) EA. 715**, or as stated in case of **Teper V Republic (1952) AC 480**.

"It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances, which would weaken or destroy the inference."

See also **Rex V Kipkering Arap Koske and Another (1949) EACA 135** and **Mkendeshwo V Republic (2002) 1 KLR 461**.

There is evidence that PW1 saw the accused leave with his deceased son on that fateful evening. PW1 was emphatic that she saw the son leave with the accused. It would appear that the deceased was so excited as to what they were about to do with the accused such that he left his cup of milk and roasted maize that he was meant to take on the table as he rushed out with the accused. Soon thereafter the deceased is found bludgeoned to death and the person who went out with him is missing. He disappeared from the scene and it was not until after 20 days that he was arrested elsewhere far from the scene of crime. Having believed the testimony of PW1, I must of necessity discount the alibi defence of the accused. I believe the accused never left the homestead of PW1. He was the last person to be seen with the deceased. If he did not commit the crime why then did he run away. Surely if the accused had been attacked by the other people and him alone and not the deceased managed to escape by the grace of God, did it not behove of him to report the incident to PW1 immediately for appropriate remedial measures to be taken. Are there any inculpatory facts that are not only inconsistent with the innocence of the accused but also co-existing circumstances which would weaken or destroy the inference of guilt on the part of the accused? The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution. It is a burden which never shifts to the accused person. The accused having been the last person to be seen with the deceased alive, is there any possibility that someone else other than the accused could have committed the offence? I do not think so. Soon after the accused left the house, PW1 heard her son call her out and the accused ordering him around. If indeed there had been anybody else involved in the crime, it would not have been necessary for the accused to escape from the scene and go underground for close to 20 days. If indeed he had survived the attack on them by strangers the most probable thing he would have done was to have reported the incident to PW1. He did not. This conduct of the accused is in my view inconsistent with his innocence. The accused claims that PW1 framed him with this case. However he does not advance any reasons for the frame up. If anything and according to his own testimony and that of PW1 they lived harmoniously. It is hard to even imagine that PW1 would have conspired to kill her own son merely to frame the accused. To what advantage would PW1 have undertaken such heinous venture? None whatsoever in my view.

It does also appear from cross-examination of prosecution witnesses by the accused that he is saying that there was no motive for him to kill the deceased. It is trite law that failure to prove motive does not, per se vitiate the accused's conviction on murder as by dint of the provisions of section 9 of the penal code, motive is not one of the elements necessary to prove a criminal offence! Was the accused perhaps referring to malice aforethought! Much as there is no direct evidence on this aspect of the matter, it can however be inferred from the manner and the viciousness with which the offence was executed. In the circumstances of this case the deceased was cut severally and indeed using the axe, panga and or knife the person responsible delivered a fatal blow that severed the spinal cord of the deceased. In causing these injuries the killer must have intended the death of the deceased hence malice aforethought is thereby established. In the end I hold, after consideration of the entire evidence on record that the circumstantial evidence not only irresistibly points to the accused as the person who killed the deceased, but also excludes any co-existing circumstances which would weaken or destroy such inference.

The accused's main defence is that of Alibi. That on the material day he was very far from the scene of crime. It is trite law that an alibi if acceptable is a complete defence. A person who raises an Alibi defence assumes no responsibility of proving it. The task of disapproving such defence rests squarely with the prosecution. In this case the Alibi defence was only raised when the accused was put on his defence. As correctly submitted by **Mr. Orinda**, it only popped up in the accused's unsworn statement of defence thereby giving the prosecution little or no time at all to investigate it. Much as the accused has no obligation in proving the Alibi, however, if raised late in the day, as in this case, then other considerations come into play. The totality of the evidence has to be re-evaluated vis a vis the Alibi defence. However it is sufficient if the Alibi advanced introduces into the mind of the court a doubt that is not unreasonable – see **Said V Republic (1963) E.A. 6, Sekiteleko V Uganda (1976) E.A. 531 and Wang'ombe V Republic (1980) KLR 149.**

Looking at the totality of the evidence marshalled by the prosecution as against the Alibi advanced by the accused I am far from being convinced that the Alibi defence is anything but true. I think it was conjured up by the accused to mislead the court. Infact it was an after thought. It does not at all

introduce in my mind any doubt as to the accused's culpability. PW1 clearly stated in her evidence that the accused was in her residence. He had supper before taking the deceased out. When she screamed and attracted the attention of PW2 who immediately came to her aid, she immediately told him that it was the accused who had just left with her son. Further when PW3 came to the scene, the same information was relayed to him by PW1. PW3 went out looking for the accused thinking that the accused could have been killed as well. Similarly when PW4 came to collect the body, he was informed that the accused had been with the deceased and started looking for him. They did so for a whole day unsuccessfully. Information was then relayed to Mweiga police station to look out for the accused since he came from that area. True enough 20 days later the accused was arrested. PW6, the father of the deceased was also told by his wife that the deceased had been with the accused moments before he was found dead. Now if PW1 had given the accused permission to travel to his home as claimed by the accused, why again would she have turned around and told whoever came to her assistance that the accused had left with the deceased moments before he was found dead. If indeed it was true that the accused left for home on the eve of the death of the deceased there would have been no point in PW1 stating that the deceased had been in the company of the deceased at all. Infact at that stage, there was even fear that the accused may also have been killed, hence the intense search for him as well. That being the case, PW1 could not have lied about the presence of the accused in the homestead on the material day. The alibi story of the accused is simply unbelievable.

In the result, I have come to the inevitable conclusion just like the Assessors herein that there is sound and credible, direct and circumstantial evidence to convict the accused for the offence of murder contrary to *section 203* as read with *section 204* of the Penal Code. Accordingly the accused stands convicted as charged. The assessors are now discharged from these proceedings with the gratitude of the court.

Dated, signed and delivered at Nyeri this 31st day of October 2007.

M.S.A. MAKHANDIA

JUDGE