



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

**AT NYERI**

**Criminal Case 100 of 2003**

**REPUBLIC..... PROSECUTOR**

**VERSUS**

**GEOFFREY MWANGI WATUKU..... ACCUSED**

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

Geoffrey Mwangi Watuku (*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 14<sup>th</sup> day of June 2003 at Ngaru village in Murang'a District within Central Province he murdered Mercy Nyambura Watuku (*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.

In an effort to prove their case, the prosecution called 10 witnesses. There were two eye-witnesses to the commission of the offence. These were the deceased's daughter in law Serah Gachambi (P.W.5) and the deceased's grandson John Chege Muchori (P.W.4) who was 11 years old at the time of giving evidence. Their evidence was that the Accused is a son to the deceased. On the material day they were at their rural home in Gikoe village. The two were normally residing in Nairobi but would occasionally visit their rural home and stay there, sometimes for as long as a week or two. P.W.5 and P.W.4 were also living within the same home.

At about 4.00 p.m., the Accused removed his clothes from the house and kept them outside the house, He then took a piece of firewood intending to burn the clothes, but the deceased cautioned the Accused not to burn the clothes near the house because the fire could burn the house. The Accused then slapped the deceased twice and the deceased fell down. Accused thereafter picked a stone and hit the deceased with the stone on the left side of the head. He picked the stone again and hit the deceased on the left ear. The deceased started bleeding and vomiting from the mouth. In the meantime P.W.4 and P.W.5 were screaming.

Geoffrey Muchiri Mwangi (P.W.3) a relative of the deceased who was also employed by the deceased was working in the shamba about 200 metres away from the house. He heard the screams and

walked back to the house. He found the Accused standing holding a stone. According to P.W. 3, He tried to prevent the Accused from throwing the stone at the deceased. The Accused managed to throw the stone but it did not hit the deceased. When P.W.3 looked at the deceased He noted that she was lying down and had injuries. P.W.3 therefore ran for help.

Joseph Kariuki Wanjiku (P.W.2) a neighbour to the deceased also heard the screams and ran to the home of the deceased to find out what was happening. He found the deceased lying down outside her house with blood oozing from her head. P.W.2 ran to call other neighbours to come and assist.

Kuria Kathungu (P.W.8) received the news from P.W.4. He went and found the deceased still lying down. The neighbours finally succeeded in getting a vehicle and the deceased was taken to Nyeri Provincial General Hospital where she was admitted. Subsequently she was transferred to Kenyatta National Hospital where she later died.

On the same day of the incident, the Accused was escorted to Nyakianga Police Station by members of the public. He was re-arrested by Sergeant Masine Ngau (P.W.10) who also visited the scene and collected a stone which was identified by P.W.4 and P.W.5 as the stone which the Accused used to assault the deceased. The stone was produced in evidence as an exhibit.

Samuel Wagana Watuku (P.W.1) who is a son to the deceased, testified that He identified the body of the deceased to the Doctor for purposes of a post mortem examination on the 27<sup>th</sup> June 2003. However, P.C. Clement Muthoka (P.W.9) maintained that the body was identified by P.W.1 on 26<sup>th</sup> June 2003 although the post mortem examination was actually done the following day i.e. 27<sup>th</sup> June 2003. No post mortem examination report was produced in evidence as the prosecution failed to avail Dr. Jane Wasike who prepared the report as a witness. The Accused was examined by Dr. Abraham Gatange(P.W.6) on the 15<sup>th</sup> July 2003. Dr. Gatange found the Accused to be both physically and mentally normal. He produced a P3 form to that effect. When put to his defence the Accused person elected to remain silent.

From the evidence that has been adduced it is apparent that P.W.4 and P.W.5 saw the Accused person slap the deceased twice and also hit her twice with a stone. Although P.W.4 is a minor his evidence was in tandem with that of P.W.5 and there was therefore ample corroboration of P.W.4's evidence.

The evidence of P.W.3 differs slightly from that of P.W.4 and P.W.5 but it is evident that P.W.3 found the deceased already lying down bleeding. P.W.3 was in fact attracted to the scene by the screams of P.W.4 and P.W.5. This confirms that P.W.3 arrived at the scene after the Accused had already slapped the deceased twice and hit her twice with a stone as described by P.W.4 and P.W.5. Although P.W.3 testified that He found Accused holding a stone and tried to prevent him from throwing the stone at the deceased, this was not contradictory as it is evident that this was after the Accused had already slapped the deceased twice and hit her twice with a stone. The evidence of P.W.3 was in fact consistent with the aggression described by P.W.4 and P.W.5. I therefore accept the evidence of P.W.4 and P.W.5 and find that the Accused person did assault the deceased on the material day.

The question is: what injuries did the deceased suffer as a result of the assault upon her by the Accused? What caused the death of the deceased? Was it an act or omission on the part of the Accused? If so did the Accused have any malice aforethought?

The evidence adduced by P.W.4 and P.W.5, confirms that the Accused hit the deceased and injured her causing her to bleed from the head, mouth, nose and ear. Samuel Wagana Watuku (P.W.1) who saw the deceased at the Intensive Care Unit in Nyeri Provincial General Hospital, a day after the incident noted that her left eye was badly injured, her left ear cut and she also had injuries on the left side of the forehead.

There is evidence that the deceased was admitted at Nyeri Provincial General Hospital for one week before being transferred to Kenyatta National Hospital. No evidence was however adduced from the Hospital to confirm her state at time of admission or what she was being treated for. It therefore becomes difficult to know for certain the extent of the injuries suffered by the deceased as a result of the assault,

and whether there was any correlation with what she was being treated at the hospital.

Although there was evidence that a post mortem examination was done, no post mortem examination report was produced. Moreover there was contradictory evidence as to when the body was identified to the Doctor for the examination. There was therefore no conclusive evidence regarding the deceased's cause of death.

In the case of *Ndungu v Republic [1985] KLR 487*, the court of appeal held *inter alia*:

***“Though there are cases in which death can be established without medical evidence relating to its cause as where there are obvious and grave injuries, medical evidence should still be adduced in such cases of the effect of such injuries as opinion expert evidence and as evidence supporting the cause of death alleged by the prosecution.”***

The prosecution did not make any effort to produce any other medical evidence to support the cause of death. It was entirely upon the prosecution to prove not only that the deceased died but that He died as a result of the injuries inflicted upon her by the Accused. In failing to call crucial medical evidence the prosecution failed to establish beyond reasonable doubt that the deceased's death was as a result of the assault inflicted upon him by the Accused. Although the 3 assessors returned a unanimous opinion that the Accused was guilty of murder, the 3 assessors failed to consider the impact on the prosecution case of the failure to establish the cause of death. I therefore respectfully differ with the assessors and find the Accused person not guilty of the offence of murder.

Notwithstanding the fact that there was no P3 form produced, the evidence clearly establishes that the Accused person did assault the deceased and caused her actual bodily harm causing the deceased to bleed from the mouth. I am satisfied that there was sufficient evidence establishing the minor offence of Assault causing actual bodily harm contrary to **section 251** of the Penal Code and I do therefore find the Accused person guilty of this offence. I convict him of this offence under **section 179 (2)** of the Criminal Procedure Code.

***Dated, signed and delivered this 25<sup>th</sup> day of September 2006.***

**H. M. OKWENGU**

**JUDGE**