



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CRIMINAL DIVISION**  
**CRIMINAL CASE 55 OF 2005**

**REPUBLIC ..... PROSECUTOR**

**VERSUS**

**STEPHEN DWIGA NYAGA ..... ACCUSED**

**JUDGEMENT**

The Accused is alleged to have murdered Sammy Nyaga Ndwiga who was his biological son. He is alleged to have committed an act of murder on 9th November, 2003 at Eastleigh Section I in Nairobi.

The first element of the offence of murder is proof of the death of the deceased. The Prosecution in this case has called Dr. Jane Wasike (PW.8) a Pathologist who performed Post Mortem on the body of the deceased which was witnessed by PW.4 Peter Wanjuki Gathua an uncle to the deceased. Moreover the Accused himself in his defence conceded that the death of the deceased occurred on the night of 9th November, 2003 as particularized in the charge.

The Prosecution called four witnesses (PW.1, PW.2, PW.3 and PW.5) to prove that the Accused by his voluntary act killed the deceased with malice.

It has apparently emerged from the evidence that the Prosecution case rests on the circumstantial evidence. I may note here that the circumstantial evidence is as good as any direct evidence but due to sheer nature thereof a trite law has been established by a long line of precedents.

Before I could proceed to convict the Accused on the evidence led, I should be absolutely certain that the Prosecution has established a cogent and consistent net of evidence which is so tight that it is impossible for the Accused to slip through its mesh. In other words, I should be satisfied beyond reasonable doubt that the evidence is totally inconsistent with innocence of the Accused. This burden, of course, is on the Prosecution squarely which does not shift to the Accused person.

Two Assessors formed an opinion that the Accused is guilty because his defence that the deceased fell from a stair case has not been witnessed by any of the Prosecution case. Unfortunately despite specific attention was drawn as to specific laws, the two Assessors seemed not to have grasped the same by observing as aforesaid. The third Assessor found the Accused not guilty.

Be that as it may, after the above observation I shall now deal with the evidence led. PW.1 Ibrahim Njoroge is a neighbour of the Accused. According to him they both were staying on the 1st floor of the plot in Eastleigh. I also note that all the witnesses had placed the incident on 8th November, 2003 and not on 9th November, 2003 as has been put in the particulars of the charge sheet. Despite the above, I may consider the evidence as led.

PW.1 stated that at about 8.00 p.m. he went to the Accused's home to ask him to give the deceased

to PW.2 and although the Accused refused to give the baby to PW.2 by abusing her, what he stated specifically was that he saw the deceased alive from the window of Accused's house. Then again he said that the Accused was at his home till 10.00 p.m. when he (PW.1) asked him to go home as he (PW.1) was sleepy.

While he was sleeping he heard a noise of beating from the next house and also someone jumping. I pause here, and state that there is no evidence that the Accused was living next to his house. Moreover, he also stated during cross-examination that their houses were at a distance of about 20 metres. That distance cannot place them as adjacent to each other. Accused in his sworn statement has stated that his next door neighbour is one Fatuma who is not a witness in this case. According to the witness, the electricity of the plot went off and after some time he heard thereafter someone saying that he had killed the child. No other witness has stated that lights went off. Anyway, he went out and saw the Accused telling PW.2 **"take him to bed he has lot of sleep"**. When the accused tried to run away he followed him and after great chase, he (the Accused) was caught and brought back. The Accused and the deceased were taken to Police Station. To show issue of malice on the part of the Accused this witness testified that the Accused used to tell him that the deceased's mother (PW.3) did not respect him and mistreated him, but on the same breath he also said that the Accused was good with the deceased and that the deceased would run to him.

PW.2 is Grace Muthoni and a maid to the deceased. She did not state that she asked PW.1 to call on the Accused and ask him to give her the deceased. She said she went to look for the deceased at 7.00 p.m. but was told that he was with his father (Accused). She went to Accused's house but did not find him. After ten minutes she went back but the Accused refused to give her the child saying he would give the child to the mother.] After some time the Accused came to her house and gave her the child saying he should be put in bed as he was sleepy. These words are different from those stated by PW.1. Furthermore, from her evidence this incidence could not have occurred past 10.00 p.m. (see evidence of PW.1).

Anyway, when she saw the child he had blood on nose, ears and mouth and she screamed for help. Once again pausing here, if the Accused had given the child to PW.2 before she screamed, PW.1 could not have seen him giving the child to PW.2 and saying what has been testified by PW.1. Obviously he was woken up by the scream which was from PW.2 as per the Prosecution case.

These are the material witnesses of the Prosecution to show the guilt of the Accused whose testimonies cannot be taken as credible due to major discrepancies in their testimonies.

PW.3 Lucy Wanjiku is mother to the deceased who admitted that the Accused was father of the deceased but they had been separated but lived in neighbourhood. She talked about an incident in September 2003 where the Accused had told her that what is left to be taken from her is to kill the child. But immediately thereafter she said the child wanted to go to the Accused as he liked him (Accused). The incident occurred after according to her, the Accused only took her stove. Anyway despite the above inference she allowed the deceased to go to the Accused. She was not at home during the evening of 8th November, 2003. Then she said that she was with the child at 7.00 p.m. and left home at 8.00 p.m. I note here that as per PW.2 she started looking for the deceased at 7.00 p.m. and that the child was returned to her by the Accused when she found him with injuries.

PW.5 James Wanjau is older son of PW.3 (no relation with the Accused). He said that on 8th November, 2003 the Accused came to his mother's kiosk, at around 9.00 p.m. which was managed by him and threatened that either him (PW.5) or any of the family would have problem. I would note here that as per PW.1 the Accused was at his house till 10.00 p.m.

I take it that this evidence was led to show malice of the Accused for the charge on hand. I must state that due to apparent discrepancies in his testimony and that of PW.1 as well as PW.2, I cannot accept this evidence as credible.

PW.7 is a relative to PW.3 and stated that the Accused and she were married. He also stated that the Accused came to his home at 8.30 p.m. to greet him with the deceased. Thus seen by both PW.1 and this

witness the deceased was alive and well in company of the Accused.

PW.8 Dr. Jane Wasike the Pathologist who performed autopsy stated in her Post Mortem report that cause of death was head injury due to blunt object. She also agreed that the injury could have occurred due to a fall.

The Accused said the same thing in his sworn testimony. He narrated how he spent his day with the deceased. At around 9.00 to 9.30 p.m. he was climbing his stairs with the deceased who was behind him. He reached his home and opened the main door, but when he was opening the bed-room door he heard screams of the deceased. He went out and saw him falling down the stairs. He took the injured child to PW.2 so that he could take a taxi. On the way he saw PW.1 and one Ken who asked him where he was going. He told them what had happened. They advised him to go back and carry the child, while looking for a taxi. When they went back the child had already died and people started accusing him of killing the deceased.

He, by producing a sketch plan of the building, showed that it was impossible for PW.1 to hear any noise from his house as there was a room and bathroom between the two. However none of these issues were raised during cross-examination.

While noting the above, I have to keep in my mind that it is the prosecution who carries burden to prove the charge beyond reasonable doubt.

I should also note that although the Accused was arrested almost immediately after the incident, no search of his room was made and no murder weapon was produced. That can be fatal under the circumstances.

Even if I ignore the above issue, which I cannot, I do find that the evidence led is full of yawning gaps and the Accused should be allowed to come out from any of them

Lastly, the charge has not been proved as per the particulars. I have already observed earlier that the dates of commission vary between the evidence and the particulars of the charge which once again is fatal blow to the Prosecution case.

Considering the aforesaid, I do find that the prosecution has miserably failed to prove the charge against the Accused person. I therefore enter finding of not guilty against the Accused and acquit him of the murder of Sammy Nyaga Ndwiga as leveled against him.

I therefore disagree with the opinion of the two Assessors and agree with that of the third one.

I thus direct that the Accused be released forthwith, unless held otherwise as per law.

**Dated and delivered this 26th day of October, 2005.**

**K.H. RAWAL**

**JUDGE**

**26.10.05**