



REPUBLIC OF KENYA

**IN THE HIGH COURT OF KENYA**  
**AT NAKURU**

**Criminal Case 38 of 2003**

REPUBLIC.....PROSECUTOR

VERSUS

RAHAB WAIRIMU NG'ANG'A.....1ST ACCUSED

GABRIEL MUIGAI CHAU.....2ND ACCUSED

**JUDGMENT**

The Accused have been charged for the offence of Murder, contrary to Section 203 as read with Section 204 of the Penal Code. The facts of the prosecution case as stated in the information are as follows:

***“On the 25th June, 2003 at Mirera Farm, Naivasha Municipality in Nakuru District of the Rift Valley Province, jointly with others not before Court murdered Joseph Ng’ang’a Munyua.”***

During the trial, it was apparent that the Accused 1 is the widow of the deceased. During the subsistence of their marriage, they were blessed with two children viz,

- *J.M.N. and* -

*Z.I.N..*

Prior to the death of the deceased, the couple were operating several businesses jointly. After the close of the prosecution case, the Court **“acquitted”** the Accused 3 and Accused 4 for reasons that have been stated very explicitly. In his evidence, the PW2 – **Zacharia Mwangi Ngotho** deposed that on 25th June, 2003 at around 7.30 p.m. while he was in the company of Joseph Maina, Joseph Njoroge and Simon Gichuru he heard noise like a tyre burst. On coming out of the house, he heard the Accused 1 shouting the following:

***“Zackayi...Oohwi, Oohwi...come and help me...my husband is dying...”***

Later, the Accused 1 pointed out where her husband was. The PW2 found the deceased next to the vehicle Registration No. KAC 610 K Saloon. The PW2 observed that the deceased was bleeding profusely from the right side of the chest. In addition to the above, the PW2 saw a stranger who was standing next to the vehicle and he gave him a torch. Consequently, they took the deceased and put him on the back seat of his vehicle. Subsequently, the stranger drove the vehicle to the hospital while the Accused 1 was making calls through the mobile phone. Apart from the above, the PW2 also stated that the Grey Checked Coat – **Ex.1** and a cartridge had been found in the driver’s seat. In his evidence, the PW4 – **Joseph Mwai Maina** confirmed and corroborated the story of the PW2 in details.

Besides the above, the PW4 also stated that while the deceased was being treated he accompanied police officers to the scene where they recovered the coat of the deceased which had a cheque book and other documents. On the following day, the PW4 was informed by the brother of the deceased that the latter had passed away. In addition to the above, the PW4 also stated that he had seen the Accused 3 and 4 burning the deceased's jeans trouser and T-shirt.

In her evidence, the PW6 – **Florence Wambui** recalled that on the 25th June, 2003 at around 7.30 p.m. she saw a vehicle being turned in front of her house. On coming out of the house, she realized that it was the deceased's car that was being driven next to a gate with the lights being on. Shortly after she entered her house, the PW6 heard a bang and the Accused 1 calling for help and complaining that they had been attacked by robbers. When the PW6 opened her window, she saw somebody running ahead while carrying a gun on his shoulder. Consequently, the deceased was taken to the hospital and the PW6 went to the scene where she observed blood on the ground. The PW7 – **Cecilia Wairimu Mbai** introduced herself as a businesswoman operating a shop that deals in maize, cereals and porridge flour. The PW7 recalled that on 25th June, 2003 at around 7.30 p.m. she received a phone call from the Accused 1 who complained that they had been attacked by thugs in their Plot at Kabati. Subsequently, the PW7 went to Mt. Longonot Hospital where she met the Accused 1 who narrated how she and her husband had been attacked. When the Accused 1 complained that she was feeling heavy in her stomach, the PW7 advised her to see a doctor who later gave her medicine and an injection. Thereafter, the deceased passed away, and the PW7 escorted the Accused 1 to report the matter at Naivasha Police Station. The PW7 later accompanied the Accused 1 to the home of her mother-in-law. After the prayers, the PW7 went to sleep in the home of the Accused 1. On the 28th June, 2003, the PW7 went back to console the Accused 1 and found many people who had also gone there for the same purpose. In the afternoon, the PW7 escorted the Accused 1 to the Naivasha District Hospital. When they were leaving the hospital, one worker told the PW7 to collect the clothes of the deceased. In response the PW7 declined to collect the said clothes.

In his evidence, the **PW5 – Mbogo Donald Mugo** who is a Firearms Examiner with over 30 years technical experience in firearms recalled that on 9th July, 2003, he received - a fired cartridge case – **Ex.6** in 7.62 x 39 mm from **PC Frederick Musyoki**. On examining the same, he formed the opinion that the said cartridge case could have been fired from either an AK-47 Assault rifle or Simonov Carbine. Later, the PW5 produced his Report – **Ex.7**. On 6th August, 2003 the PW5 received a checked coat – **Ex.1**, **Maroon Blouse Top – Ex.2** and White Camisole – **Ex.3** from PC Frederick Musyoki. According to the PW5, he examined the above carefully and formed the opinion that the shot was fired from the rear left of the coat to enable the bullet to attain the path in question. On examining the maroon blouse top, the PW5 observed a straight cut with a sharp object and additional tearing around the hole. He was of the view that the tearing was **not** consistent with a bullet hole. Subsequently, the PW5 examined the white camisole – **Ex.3** and observed that there was a forced injury to the linen that never tore the same apart. He also formed the opinion that the cloth injuries on **Ex.2** and 3 are inconsistent with a bullet path. The PW5 formed the opinion that the hole on the blouse could have been made by a sharp instrument while the injury on the camisole must have been made by a blunt object.

In his evidence, the PW10 – **Dr. Musalia Wycliffe** stated that on 28th June, 2003 he examined the deceased and observed that he had a gun shot injury on the left back region on the left side. The said wound penetrated into the chest cavity and exited on the front aspect. In addition to the above, the PW10 observed a linear right incision on the right side and a rugged area. He also observed that the 2nd and 3rd ribs had been fractured and that there was massive bleeding on both cavities – and both lungs were torn. The PW10 was of the opinion that the deceased died due to hemorrhagic shock following a gun shot to the chest. Thereafter, the PW10 produced the Post-Mortem Report – **Ex.1**. On the 18th August, 2003, he examined the Accused 1 and observed that she had a small healed scar on the right side of the chest – which was like a bruise. In his evidence, the PW11 – **Cpl Frederick Musyoki** recalled that on the night of 25th June, 2003 while he was on patrol with PC Odhiambo and PC Driver Cheruiyot, he was called by the D.C.I.O. viz, **Chief Insp. Alusa** who directed them to go to Mt. Longonot Hospital. On arrival there, the PW11 met the Accused 1 who narrated to him what had transpired. Later, the PW11 was taken to the scene by Maina and he recovered a Checked Coat – **Ex.1**, a Cheque Book, Driving Licence, 3 Identity Cards for James Munyua Ng'ang'a, Margaret Nyambura Munyua and Rahab Wairimu Ng'ang'a, an empty cartridge –7.62 mm special which is usually used on AK-47. Consequently, the Accused 1 narrated

to the PW11 how she and her husband had gone on safari before the incident took place. The PW11 was categorical that the Accused 1 insisted that the deceased had been shot from the right and the bullet penetrated up to where she was. The PW11 also stated in his evidence that he discovered that on 27th June, 2003 at 12.17 p.m., one Kiogora was rung through cell phone No. 0722-691 302 which belonged to the deceased. The PW11 stated that, by then, Kiogora was aware that the above cell phone had been stolen together with cash Kshs.12,000.00. The PW11 took exception that the Accused 1 was evasive in identifying Kiogora and the alleged Maasai. The PW11 was also not amused with the fact that the Accused 1 had instructed her workers to sweep the glasses at the scene and throw them away. Eventually, the PW11 received a report from the Government Chemist that confirmed that there was **no** blood on the maroon dress and camisole. In addition the report also stated that gun powder was **not** detected on the maroon dress and camisole.

In her defence, the DW1 – **Rahab Wairimu Ng'ang'a** confirmed that she is the widow of the deceased and also a businesswoman. That apart, she also stated that during the subsistence of their marriage, they were blessed with two children. The Accused 1 recalled that she and her late husband used to operate a shop called Farm Company Products where they used to manufacture mineral supplements and animal feeds. Apart from the above, they also used to operate a butchery and Agro-Vet Shop. The Accused 1 also recalled that on 25th June, 2003 at around 12.00 noon the deceased asked her to accompany him to Suswa where they arrived at around 1.00 p.m. They worked up to 4.00 p.m. when they embarked on their journey back to Naivasha. On the way, they gave a lift to a young Maasai man. Reaching Mai Mahiu area, they met the Accused 2 at the bus station and they gave him a lift. When they reached Oasis Academy, the young Maasai man alighted. Reaching the scene of the incident, the Accused 1 saw two people. One of them was carrying a gun. While the two people approached them, the deceased tried to take the purse of the Accused 1 and give them. Suddenly, the Accused 1 heard a loud noise and her husband came out of the vehicle while raising his hands. One of them searched him while another kept guard with the gun. When the thugs ran away, the deceased fell down and the Accused 1 raised an alarm. Later the workers of the deceased rushed to the scene. Subsequently, the Accused 2 drove the vehicle that had carried the Accused 1 and deceased to the hospital. According to the Accused 1, the deceased pleaded that he should be helped quickly because he was bleeding profusely. While at the hospital, the Accused 1 stated that she was also examined before being given an injection and some drugs. The Accused 1 also stated that her wounds were dressed for about a week. The Accused 1 denied that she had given any instructions for her husband's clothes to be burnt. In addition to the above, the Accused 1 conceded that she had rung Kiogora on 26th June, 2003 to tell him to stop banking a cheque that they had issued to him by and of May, 2003. The Accused 1 narrated how she was told after the burial to report at the police station with her parents and parents-in-law. On 8th August, 2003, she was arrested and placed in custody. According to the Accused 1, on 14th August, 2003, she was summoned to the office of the D.C.I.O. where G. K. Ng'ang'a directed her to surrender to him her businesses so that the charges against her could be dropped. However, the Accused 1 refused to concede to the above. The Accused 1 produced several invoices and statements that indicated that their businesses were in debt.

In his evidence, the DW2 – **Gabriel Muigai Chau** confirmed and corroborated the story of the Accused 1 in details. In his medical evidence, the DW3 – **Dr. Stanley Ominde Khainga** deposed how he had rushed to the hospital on the material day after being informed of the shooting of the deceased. The DW3 observed a huge wound and small wound on the right side which were bleeding profusely. Without examining the back, the DW3 put a chest tube and arrested the active bleeding. However, the heart arrested and the deceased died. Later, the DW3 examined the Accused 1 and found that she had superficial wound on the upper part of the abdomen. The edges of the wound were irregular and had soot particles. According to the DW3, the above gave him an impression that the same was gun-shot wound. In his evidence, DW4 – Pastor Zakayo Itemo confirmed and corroborated the story of her daughter in details.

This Court has carefully perused the evidence on record. Unfortunately, the only two eye-witnesses to the offence are the two accused persons. The two of them viz, Rahab Wairimu Ng'ang'a and Gabriel Muigai Chau have explained how the said incident took place. They explained how the deceased was shot in cold blood by unknown thugs. However, the investigating officer viz, Cpl. Frederick Musyoki never believed their stories and that is why they were charged for the offence of Murder, contrary to Section 203 as read

with Section 204 of the Penal Code. The reasons that convinced Cpl Musyoki that they were involved in the murder of the deceased are:

- *that though he took sniffer dogs to the scene, they never pursued any suspects in any direction.*
- *that the Accused 1 had insisted that the deceased had been shot from the right and that the bullet penetrated upto where she was.*
- *that on 27th June, 2003 at 12.17 p.m. Kiogora was rung through cell phone No. 0722-691302 which belonged to the deceased. By then, Kiogora was aware that the above cell phone had been stolen together with cash Kshs.12,000.00.*
- *that the Accused 1 was evasive in identifying Kiogora and the alleged Maasai.*
- *that the Accused 1 had instructed her workers to sweep the glasses at the scene and throw them away.*
- *that the Government Chemist Report confirmed that there was no blood on the maroon dress and camisole and - that there was no gun powder that was detected on the maroon dress and camisole.*
- *The PW11 was not amused that the Accused 1 had gone to Naivasha Police Station on the following day to collect her husband's vehicle when she should have been mourning.*
- *The PW11 was very much hurt by the fact that the Accused 1 had sat on the front seat with the driver while her injured husband was in the back seat – being carried by somebody else.*

In the absence of direct evidence, the prosecution relied heavily on circumstantial evidence. In the case of **Simon Musoke Vs Republic [1958] E. A. Page 716**, the Court of Appeal held as follows:

*“In a case depending exclusively upon circumstantial evidence, the Court must, before deciding upon a conviction, find that the inculpatory facts are incompatible of explanation upon any other reasonable hypothesis than that of guilt.”*

**Taper Vs Republic [1952] 2 All E. R. Page 447** followed. The above case was quoted with approval in the case of **Muchene Vs Republic [2002] 2 KLR** where the Kenyan Court of Appeal stated as follows:

*“It is trite law that where a conviction is exclusively based on circumstantial evidence such conviction can only be properly upheld if the Court is satisfied that the inculpatory facts are not only inconsistent with the innocence of the Appellant but also that there exist coexisting circumstances which would weaken or destroy such inference. It is settled law that the burden of proving facts which justify drawing of such inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution and always remains as such.”*

From the above evidence, it is apparent that though Cpl Musyoki was justified in suspecting the widow of the deceased in being involved in the murder of her husband – that alone **cannot** be a basis for a conviction in a serious case of murder. However strong the suspicions were, the Court **cannot** depart from basic principles of the law.

In the first place, the PW6 – stated clearly that she saw somebody carrying a gun who ran away from the scene. That suspect was not arrested nor was the gun recovered. That aspect of the investigations was not carried out to its logical conclusion.

Secondly, the evidence of the PW5 – **Mbogo Donald Mugo** was contradicted by that of the DW3 – **Dr. Stanley Khainga** who is a Plastic and Re-constructive Surgeon with Nairobi University. Whereas the PW5 had stated that the clothes injuries on Ex.2 and 3 were inconsistent with a bullet path – the DW3 stated that he had treated the Accused 1 of an injury caused by a gun shot. Apparently, the divergent views have been expressed by two professionals who are experienced in their areas of study.

Thirdly, the fact that the Accused 1 never sat close to her husband to show him love and affection at a crucial time is **not** conclusive that she was behind the killing. Such care and tenderness is not guaranteed in all marriages.

Even assuming that the Accused 1 never impressed the PW11 to be affectionate to her husband, why did she then take the trouble to rush the deceased to the hospital? In addition to the above, she also rang the family doctor immediately for assistance. Since the incident took place at night, the Accused 1 had the option of escaping from the scene. Instead, she tried her level best to save the life of the deceased. That conduct was not consonant with a guilty mind.

Fourthly, the prosecution evidence never clearly proved that the Accused 1 and Accused 2 had any clear motive to kill the deceased. Though the deceased was portrayed as a successful businessman – the debts that were revealed by the Accused 1 proved otherwise. According to the invoices that were produced by the Accused 1 – their businesses had debts of Kshs.528,162.00. The prosecution never produced any evidence to show that the deceased had money in excess of the above. The theory that the Accused 1 and her alleged lover had killed the deceased was not supported by any concrete facts. That was because the prosecution never adduced any evidence to prove any connection between the gun-man who shot the deceased and the Accused 1. Though the PW11 lamented that the Accused 1 had refused to identify Kiogora, it was apparent that the latter presented himself to Naivasha Police Station and recorded a statement voluntarily. In his statement, he gave his physical address. Nothing on record shows that any Investigating Officer ever followed up on Kiogora – assuming that he was a prime suspect. It was obvious that Kiogora was working with a registered company that has a fixed address. Besides the above, it was clear that it was the Accused 2 who drove the deceased to the hospital. Earlier, he had also assisted others to carry the deceased and put him on the vehicle. The Accused 2 never attempted to escape from the scene.

When the evidence of the PW11 and the prosecution witnesses is taken into totality, it does not prove that the Accused 1 and Accused 2 were involved in the murder of the deceased.

This Court wishes to resolve the above doubts in favour of the two Accused persons. It is apparent that the defence given by the Accused persons is reasonable and plausible under the circumstances. The killers of the deceased are still at large and the onus to trace them are still with the police.

The upshot is that the prosecution have failed to prove their case beyond any reasonable doubt against the Accused. Both the Accused are hereby **“acquitted”** of the offence of Murder, contrary to section 203 as read with Section 204 of the Penal Code. Both

Accused should be released forthwith unless held lawfully.

**MUGA APONDI**

**JUDGE**

Judgment read, signed and delivered in open Court in the presence of Mr. Koech and Ms

Omwenyo.

**MUGA APONDI**

**JUDGE**

**29TH NOVEMBER, 2005**

**Order:**

Assessors to be paid allowances.

**MUGA APONDI**

**JUDGE**

**29TH NOVEMBER, 2005**