



**REPUBLIC.....PROSECUTOR**

**VERSUS**

**ANN WANGARI MUNGAI.....ACCUSED**

**JUDGMENT**

The charge against the Accused person before this court is murder contrary to Section 203 as read with Section 204 of the Penal Code (Cap 63).

The particulars of the offence are that on the 18th Day of September 2000 at Arash Farm in Nakuru District of the Rift Valley Province she murdered Danstun Wambugu Waithaka.

This case is based on circumstantial evidence. There were no eyewitnesses called to testify as to whether they saw the Accused murder the Deceased.

The Prosecution's main witness was PW 1, James Waithaka the father of the deceased. He gave evidence that the Accused is his 2nd wife who he married in 1993. He had married his 1st wife in 1977 with whom he had had four children, including the deceased who was the last-born. He had differences with his 1st wife as a result of which she left in 1995 but did not take the children with her. All the children were left with the father (PW 1) who cared for them. According to his evidence there was hatred between his 2nd wife (Accused), who had her own child, and his children. She had chased away all the four children to live in a different house on the same plot. Not only did she chase them away but also refused to provide them with food, forcing them to prepare their own meals. Eventually, this forced the deceased who was the youngest to be transferred to the grandmother's place at Nyahururu. According to this witness the deceased had been treated with much cruelty and constantly cried for food and was never allowed into the father's home. After completing his primary education the deceased returned home to await admission in Secondary School. He was subjected to more cruelty. The Accused refused to pay his school fees. This witness related several incidents and events that showed bad blood between the Accused and the deceased.

On the material day, the deceased was sent out to graze the cow, a duty that he performed regularly. He was seen returning with the cow at 5.00pm but was never seen again. It was not until the following day that his dead body was accidentally found by the father in a sack concealed in the kitchen store, with only portions of his legs sticking out of the sack. Only PW I & the Accused had the key to that house, and only the accused was at home throughout. There were several items recovered such as the blood stained skirt belonging to the accused, a broom, a jembe, a metal bar and rope which were all stained with blood.

PW 2 Dr. Noah Kamindo, gave evidence of his post-mortem examination of the body of the deceased. He concluded that the death arose because of head injury, brain damage and fractured skull. PW 3 Morris Waithaka, (a brother of the deceased), PW 11, David Nguguna (PW 1's brother) and PW 12 Peris Wangare (PW I sister in law), all narrated about the bad blood between the deceased and the Accused.

PW 8, Cherono Yator and PW 9, Florence Kosgei (colleagues who worked with the Accused) told this court that the Accused left work early on the material day and never returned till the following day. More so, they narrated about the Accused's unusual behaviour on following day.

PW 4, Elizabeth Njoki Macharia, a tenant of the Accused and PW 1 told the court that she saw the accused, the deceased and the accused's son on the eve of 18/09/2000. It was the deceased who drove in the cow on that fateful evening and never to be seen alive again. The next day his body was found dead in the kitchen store.

PW 13 PC Edward Mundia who was attached to Subukia police station told this court that on the 19th day of September, 2000 he went to the scene of crime in the company of the OCS. They found the body of the deceased in a sack with legs upright and sticking out while the head was inside. Two other sacks of potatoes were placed against it. In the kitchen they found a knife with blood stains (MFI 9), In the Accused's bedroom they found a blood stained skirt (MF1 4), outside the kitchen they found a blood stained pipe and a blood stained broom (MFI 6) and finally a metal bar (MF1 7) and slippers (MF1 5) all of which were produced in court as exhibits. They were taken to the government chemist and blood sample tests were done. The blood stains found on the broom, skirt, slippers, metal bar & wooden handle www.kenyalawreports.or.ke 4 matched with the deceased blood group O. He concluded that all these items were used in the commission of the offence.

The skirt and the slippers were identified by PW 1 (the Accused's husband) as belonging to the Accused.

The Accused gave unsworn statement in which she denied killing the deceased. She said that on the material day she was at work, and knew nothing about her step-son's death.

Is the Accused person guilty of murder?

Mr. Kahiga, for the Accused, submitted that the Prosecution had not proved its case beyond doubt, that there were many questions unanswered and that not all witnesses had been called.

Mr. Onderi, for the Prosecution, argued that the case had been proved beyond reasonable doubt. The evidence given by all the witnesses is sufficient to prove that the Accused killed the deceased.

Murder is defined in section 203 of the Penal Code as follows;

“Any person who of malice aforethought causes the death of another person by unlawful act or omission is guilty of murder”.

Malice is further defined as follows:

- a) An intention to cause the death of the deceased, or any other person,
- b) An intention to cause grievous harm to the deceased or any other person. It is immaterial that the person targeted is not the one who is finally killed or injured
- c) An intention to commit felony

Before a court can base a conviction exclusively on circumstantial evidence, it must be satisfied that the inculpatory facts irresistibly point at the accused and are incompatible with the innocence of the accused and incapable of any explanation other than the hypothesis of guilt. More so, the court must also be sure that there are no other co-existing circumstances, which would weaken or destroy the inference. See Republic vs. Kipkering Arap Koske 16 EACA 135 , and Kariuki Karanja Vs Republic (1986) KLR 190 .

Moreover, in the case of Samuel Ngugi Ndingiri Vs Republic Court of Appeal No 25 Of 1992 , the Appellate Judges stated as follows;

When the deceased was last seen alive in the company of the accused, common sense demand that the Accused explain where he parted company with the deceased on the material date, since that was a matter which was peculiarly within his knowledge and only him could be expected to know and explain it. Section 111(1) Evidence Act Cap 80 Laws of Kenya and because he didn't do so, a rebuttable

presumption arises that he knew under what circumstances the deceased was killed. It is a clear presumption of fact, which a court is entitled to make under the provisions of Section 119 Cap 80 Laws of Kenya .....Therefore if an offence was committed without being noticed or without attracting attention unless it was the Accused or some person with the Accused's knowledge and approval which could then make him a Principal offender.

In this case PW 4 and PW 5 testified that they saw the Accused in the compound of her house with the deceased. She was the last person to have been seen with the deceased on the eve of his death.

The deceased was found dead in the kitchen store of her house. Only she and her husband (who was nowhere around the house at the time) had the keys to the house leading to the kitchen.

PW 1, PW 8 and PW 9 testified about the Accused's conduct which was inconsistent with innocence. The Accused seemed not bothered or concerned about the whereabouts of the deceased when everyone else was.

The prosecution exhibits included the Accused's blood stained skirt, slippers, a broom, a jembe, a metal bar and rope which were all stained with blood matching that of the deceased. These show a definite connection linking the Accused to the murder of the deceased.

The injuries found on the deceased's head as testified by PW 2 (a Doctor) clearly showed that whoever inflicted them intended at very best to cause grievous bodily harm and that the injuries alone are evidence of malice aforethought and all the circumstantial evidence is overwhelming and shows that the accused murdered the deceased.

All the Assessors returned a verdict of guilt. I, therefore, find the Accused, Ann Wangari Mungai guilty of murder contrary to Section 203 as read with Section 204 of the Penal Code (Cap 63) Laws of Kenya.

**Dated and delivered at Nakuru this 26th day of July 2004.**

**ALNASHIR VISRAM**

**JUDGE**