



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

CRIMINAL CASE NO. 15 OF 2014

REPUBLIC.....PROSECUTOR

VERSUS

LABAN KAMAU KIARIE.....ACCUSED

JUDGMENT

1. In the month of May 2014, Margaret Wanjiku Kamau (hereafter *the deceased*) went missing. The badly decomposed body of the deceased was later discovered inside the well in her compound. Owing to the condition of the remains, the pathologist could not ascertain the cause of the death.

2. The accused, who was working as a farmhand for the deceased, was suspected of having a hand in the homicide. The Republic brought *Information* to the High Court charging him with *murder* contrary to section 203 as read with section 204 of the **Penal Code**.

3. The particulars were that on diverse dates between 27th May 2014 and 29th May 2014 at an unknown time at Kigio Sub-Location, Gatanga District, within Murang'a County, he murdered the deceased.

4. He pleaded *not guilty*. Twelve witnesses took to the stand. The first was the deceased's daughter, Hilda Wangui (PW1). She confirmed that the accused had worked for the deceased for about seven months. Only the two of them were residing in the compound; the accused in a one-roomed house while the deceased occupied a four bedroomed house. On 28th May 2014 PW1 could not raise the deceased on her mobile phone. She alerted her brother Mwaura (PW2) who confirmed that their mother's phone was switched off.

5. The two decided to go to their mother's house at Gatanga arriving there in the evening of the same day. The gate was latched from the inside. They called the accused who arrived drunk after about 30 minutes and opened the gate. PW1 noted that the compound had been swept clean and lots of water splashed on it. She had a premonition that the accused had killed the deceased and either thrown her into a well or poured acid on her body. When he confronted the accused, he denied it.

6. She said that the accused told them that the deceased had gone on safari. He never said where she had travelled. The witness broke a glass window to the deceased's house and upon shining a light, she saw that the deceased's personal items were all neatly arranged and the beds made. The following day, they made a report at the police post at Munga Trading Centre. The accused accompanied them but was still drunk. She noted that he had a *Nokia* phone that looked like that of the deceased but he denied it. They were advised to make a report at Kirwara Police Station. The report was received by PW10, Police Sergeant David Chelagat. PW1 said that the accused could not provide a statement as he was inebriated.

7. The following day she went to Government offices at Kirwara to persue phone records of the deceased. The last signal was traced to her home. When she returned to the compound, she found many people and learnt that the deceased's body was discovered in the well. It was retrieved and taken away by the police.

8. PW1 testified that on 3rd June 2014 the police returned to the compound with the accused. He took the police around the compound and some items were recovered from the pit latrine.

9. Her version of events was re-affirmed by her brother, Julius Mwaura (PW2) and their sister Emma (PW8). Mwaura said that on the way to the police station, the accused kept asking him if he would dismiss him from work should the deceased not be found. PW2 and some neighbours decided to break into the deceased's house but found nothing significant. PW2 then broke into the well only to be hit by a foul smell. He saw what appeared to be a gunny bag in the water.

10. The witness said that just then the accused, who was standing nearby, went into the kitchen and started eating bananas. He was also sweating profusely. PW2 and some other people who included his uncle Charles Ngururi started interrogating the accused. He then struck him on the face with his open hand. The accused said he did not know anything. But when he received two heavy slaps from Ngururi he agreed to speak the truth.

11. The accused told them upon returning from the shamba, he had found Dado, Sony and Macharia raping the deceased. He changed the story and said that he was also one of the rapists. The police arrived and arrested the accused. Later, Dado, Macharia and Sony were arrested by the public and handed over to the police.

12. PW2 was present when the deceased's bloated body was removed from the well. The body was naked except for the cloth around the head. On 3rd June 2014, he and Rose Wambui (PW3) identified the remains for purposes of a postmortem examination at Kenyatta University Mortuary.

13. PW4 was Paul Mwaura. On 3rd June 2014, the accused was escorted into the compound by Police Sergeant Chelagat (PW10). He pointed out a pit latrine where he said he had thrown a kitchen knife. PW4 was then lowered into the latrine using ropes where he recovered the following items – flour, umbrella, torch and a pair of grey shoes (exhibits 2, 3, 4 and 5). He never recovered the knife.

14. PW5 was Hiram Kariuki. On 3rd June 2014, he and the Assistant Chief, Raphael Mwaura (PW11) searched the accused's house and recovered a blue/black hand bag. Inside the bag was a knife without a handle (exhibits 6 and 7). He conceded that the recovery was made in the absence of the accused and police. PW10, Police Sergeant Chelagat, said the knife was brought to the station by PW11. There is some discrepancy because according to PW5, it is the Assistant Chief who called the police to collect the items.

15. PW6 Francis Muiruri was stood down as a witness because he meandered too far from his statement to the police. When he was recalled, he said that on 30th May 2014 at around 11.00 a.m., he and others were demolishing a shed in the deceased's compound. He then found a red *Nokia* mobile phone near the accused's house which he gave it to Rachael Ngina (PW7), a daughter of the deceased (exhibit 1). PW7 said she recognized the phone that belonged to the deceased. She however identified its colour as grey make *Nokia 310*. She was alone when she handed over the exhibit to Kirwara Police Station.

16. PW9 was police Sergeant Ngare. He and and Seargeant Chelagat (PW10) went to the scene on 30th May 2014. The public had arrested the accused and locked him inside his house. They re-arrested him and also arrested three other suspects. They got reinforcements and recovered the body of the deceased from the well as well as some flour and shoes.

17. PW12 Police Constable Ithiru was based at Kirwara station at the material time. Since the pathologist, Dr. Dorothy Njeru, could not attend to the hearing, he applied to produce the original Post Mortem Form under section 77 of the **Evidence Act**. After establishing that the report had been throughout in the custody of the OCS Kirwara, and there being no objection by the defence, I allowed the application.

18. When the accused was placed on his defence, he made an unsworn statement which I will set out verbatim-

I used to be a shamba boy in Gatanga on the deceased's farm.

On 25/05/2014 I was at home. The following day I went on with my work to milk cows and so forth. Later at 1.00 p.m. I found the deceased's house open. I went in cooked, ate and returned to the farm. At 8.00 p.m. she still had not returned. It was unusual. So I called her but could not reach her. I went to bed.

On 27/05/2014 I went on with my duties. In the evening, I called deceased again without success. I called her son Mwaura but he had no information on her whereabouts.

On 28/05/2014 Mwaura called me and said deceased was not in her place. He called me again at 4.00 p.m. and said deceased was still not in his place.

On 29/5/2015 Mwaura called again to enquire about deceased. At about 8.00 p.m. Mwaura came and we reported the matter to the police and returned at 9.00 p.m.

On 30/5/2014, I joined a search party for the deceased in the area. Mwaura suggested we check the water bore hole. Mwaura broke the padlock. I do not know what they saw but they arrested me and put me in the kitchen and beat me up. Police came. I learnt that deceased had been found in the well.

19. Learned counsel for the defence, Mr. Mbutia, filed written submissions on 19th April 2021 together with some precedents.

20. Section 203 of the **Penal Code** provides that *any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.*

21. There are three key ingredients that *must* be present in the offence of murder: first, the prosecution must prove beyond reasonable doubt the *death* of the deceased and the *cause* of that death; secondly, that the accused *committed* the unlawful act that led to the death; and, thirdly, that the accused was of *malice aforethought*. Malice aforethought is the *mens rea* or the *intention* to kill another person.

22. There is absolutely *no* doubt about the *death* of the deceased. It was identified by PW2 and PW3. An autopsy was conducted on 3rd June 2014 by Dr. Dorothy Njeru. The pathologist concluded that the cause of death was "*unascertained due to decomposition*". That was not surprising considering the period the body had remained in the sealed well. I thus entertain *no* doubt that the cause of death was *unlawful*.

23. The key question now is whether the prosecution proved that the accused murdered the deceased. There was was no *eye witness* to the murder. Chief Inspector Mulili who took the accused's statement under inquiry never took to the stand. The entire case for the prosecution is thus built upon *circumstantial evidence*. In **R v Kipkering arap Koske & another** 16 EACA 135 (1949) the court held-

In order to justify the inference of guilt, the inculpatory fact must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt

24. See also **Sawe v Republic** [2003] KLR 364, **Mutua v Republic**, High Court, Machakos, Criminal Appeal 198 of 2013 [2015] eKLR, **Republic v Richard Itweka Wahiti**, High Court, Kiambu, Criminal Case 9 of 2016 [2020] eKLR.

25. I find that there are five incriminating pieces of evidence: Firstly, the accused tried to cover up the offence by lying to PW1 and PW2 that their mother (the deceased) had gone on safari to an unknown location. The truth is that she never left and was entombed inside the well in the compound.

26. Secondly, when interrogated by some people including PW2 and Ngururi he said that he and three other suspects raped the deceased on the day she disappeared. Those three were never charged. That evidence of the sexual assault is however tainted because Ngururi assaulted the accused with two heavy slaps and it never amounted to an admissible confession.

27. Thirdly, the accused led the police to the pit latrine where he had thrown away items belonging to the deceased including flour, umbrella, torch and a pair of grey shoes (exhibits 2, 3, 4 and 5). Although he told the police that he threw away the knife into the latrine, it was not retrieved by PW4 from the pit. It was discovered in his living quarters by PW5 and PW11 who gave it to the police. However, it was not established that the knife was used in the offence.

28. Fourthly, the body of the deceased was discovered in the well outside her house. It had been there for some days. I thus find that the accused had a clear *opportunity* to commit the crime. He was working as a farmhand for the deceased and only the two of them were living in the compound. This amounts to *further corroboration*. **Opo v Republic** [1976-80] 1 KLR 1669.

29. Lastly, I found the statement by the accused to be unbelievable and a sham. The only thing going for him is that he had called PW2 on 27th May 2014 to report that the deceased had not returned home. But his true intent was to get Kshs 500 from PW2 for treatment of some injury he said he suffered in the farm. It is only when PW2 asked him to get the money from the deceased that the accused disclosed that the deceased had not returned since the previous day. PW2 sent him the money. The other aspect in his favour is that he never disappeared from the *locus in quo* and participated in "searching" for the deceased.

30. I am alive that the legal burden of proof lay throughout with the prosecution. **Woolmington v DPP** [1935] AC 462, **Bhatt v Republic** [1957] E.A. 332. However, woven together with all the surrounding circumstances, I find that there is *strong* circumstantial evidence that points *strongly* to the involvement of the accused; and, which I find completely incompatible with his innocence. **R v Kipkering arap Koske & another** [supra]. There is a strong chain of events which I find *complete*; and, which demonstrates that the homicide was *premeditated*.

31. The upshot is that the accused, of malice aforethought caused the death of the deceased by an unlawful act. It must follow as a corollary, that the accused is culpable of murder. I accordingly enter a finding of *guilty*. The accused is hereby convicted.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MURANG'A THIS 6TH DAY OF MAY 2021.

KANYI KIMONDO

JUDGE

Judgment read in open court in the presence of-

Accused.

Mr. Mwangi Ben holding brief for Mr. Mbuthia for the accused instructed by J. N. Mbuthia & Company Advocates.

Mr. S. Mutinda for the Republic instructed by the Office of the Director of Public Prosecutions.

Ms. Dorcas Waichuhi & Ms. Susan Waiganjo, Court Assistants.