



**REPUBLIC OF KENYA**

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

**CRIMINAL CASE NO. 28 OF 2018**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**MUTHWIKA NGONZI.....ACCUSED**

**JUDGMENT**

1. **Muthwika Ngonzi** the accused is charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code, Cap 63 of the Laws of Kenya. The particulars are that on the 20<sup>th</sup> day of December 2018 at Kalelo Village, Kithuki Sub-Location in Kathonzwani Sub-County, the accused murdered Monicah Mueni Ngonzi.

2. The prosecution called seven (7) witnesses in support of it's case while the accused gave a sworn defence without calling any witness.

3. **PW1 Mwoka Ngonza**, a brother of the accused, testified that on 20/12/2018 at 11.30pm, he was asleep with his wife and children when his brother Nzioki Ngonze knocked on his door. His brother asked whether he had been home that evening and he replied in the affirmative. He further asked whether he had heard noise from their mother's home and he said no. Nzioki Ngonze told him that their mother's neck had been cut. Together with his wife, child and brother, they proceeded to their mother's house which was about 200 metres away.

4. The security light was on and they found her body near the gate. There was blood all over and she had cuts on the head and neck. They decided to wake everyone up including the accused whose home is about 100 metres from mother's and same to Musyoka Ngonza's. The village elder, the chief and the police were informed. The body was later taken to the mortuary.

5. The following day, PW1 and his brothers were called to the police station where they slept. Three of them were then released and the accused remained. The deceased was staying with their last born brother (Nzioki) who sells groceries at the market. The accused and deceased used to collide over the shamba every planting season and the deceased would report to the chief. This had gone on for quite some time and their aunt Rael Muteti had been informed.

6. Upon cross examination by Mr. Kioko he said that he is a farmer just like the accused. All of them were asleep and the accused was the first to be woken up. They were all placed in the cells and they even talked but nothing helped. They were called in turns the next day and released but the accused was detained. No weapon was recovered and they never heard any noises that night. He denied knowing what happened to the deceased, nor what the accused did as far as their mother's death is concerned.

7. **PW2 Jackson Musyoka Ngonzi**, a brother of the accused, testified that on 20/12/2018 he was at home when his brothers, Muthwika, Mwaka and Nzioki, went for him at 2.00am. They told him that their mother had been killed. He went to her home and saw that she had cuts on her head and neck. There was moonlight and her body was outside the kitchen. That night they went to the police station and returned there the next morning and recorded statements. PW1 and Nzioki were released while he remained there with the accused. The police asked the accused whether he had killed the deceased and he answered in the affirmative and he (PW2) was then released. He further testified that they lived well together.

8. In cross examination, he said incident happened on a Friday and the police took the body on Saturday at 10.00am. While with the accused at the police station the police went to their cell and the accused told them what he had done to the deceased.

9. **PW3 C.I Jonathan Lekachuma**, the OCS of Kavumbu police station testified that on 20/12/2018, the assistant County Commissioner informed him of a woman's body found at her home. He instructed I.P Ndunda, Cpl Nyongesa and P.C driver Eric to go to the scene. Cpl Nyongesa drew the Sketch plan and personnel from scenes of crime processed the scene. The following day, Cpl Nyongesa told him that there were no suspects and later they got information that the deceased's sons were responsible. As he was recording their statements, one of the officers told him that one of the sons had confessed to the crime. He recorded the accused's statement and released the brothers.

10. He recorded statements of five witnesses and found that two of them linked the accused to the crime. Rael Muteti recorded that the accused had threatened the deceased with death and the deceased had been to Rael's place for refuge twice. It was also said that the accused

had been having disputes with the mother and the accused himself had confessed that he threw the murder weapon into Athi River. They did not manage to retrieve the panga. The family is from his area of jurisdiction. He said he never recorded a confession for lack of assistance from the DCIO Makindu and the OCS Makueni.

11. In cross examination, he agreed that he sought extension of time to keep the accused in order to complete investigations. The accused was in Makindu custody for a month. He forgot to make a follow up on the confession and said that there was no torture. He never asked the accused to take them to where he had thrown the panga. The quarrels between the accused and deceased were not reported anywhere and there was no exhibit recovered.

12. **PW4 Sgt. Samuel Mbat**i of DCI Makadara and formerly of Makueni DCI photographed the deceased's body which was lying in her homestead with visible cut wounds on the head and a slit throat. He took 9 photos of the body at the scene and made a certificate to that effect, He produced the photos as **Exb 1a-j** and the certificate as **Exb 2**.

13. **PW5 Raeli Mutete** testified that on 20/12/2018 at 3.00am, she received a call from her elder brother's son, Muoka, and informed about the deceased's death. She informed her younger brother's children and they proceeded to the deceased's home. They arrived at 9.00am and found the body already taken away. She recalled that in August 2017, the deceased visited her and stayed for one month. She said she feared for her life as Muthwika (accused) wanted to kill her. She discussed the issue with Muthwika who assured her that he would not mistreat the deceased.

14. She invited them for a function and for the third time, the deceased told her she would find her dead. She promised to go to the deceased's home but before she could do that, she received the distressing call. When she visited the accused's home on 20/12/2018, the accused was present and they even searched for the murder weapon together. Each son was asked to avail his *panga* but the accused brought unused *pangas*. The brothers told him to bring his usual panga but he did not. Three of the deceased's sons lived in her home but the accused had built outside the home. Nzioki the last born lived in the same home with the deceased.

15. In cross examination, she said that Muoki lived about 50-100 meters from the deceased's home and Nzioki lived about 15-20 meters from the deceased's house. The accused disturbed the deceased because she had not given him goats for *ntheo* (marriage). They never reported the issue to anyone because she had children who she lived well with. She said the deceased and accused were always quarrelling. In re-examination, she said that she was one of those who distributed the land in question and nobody complained.

16. **PW6 Cpl Cleopas Nyongesa** of Kavumbu police station, testified that on 21/12/2018, he arrived at the scene with Pc Ng'eno at 5.30am. They found the body lying outside between the two houses. They used torches and stayed at the scene upto 10.00am. The deceased had injuries on the head and throat. He made a sketch plan which he produced as **Exb 3** and the crime scenes officer (PW4) took photos. Members of the public told them that the deceased's three sons were suspects, but they did not arrest anyone. They informed the Ocs who took over the investigations and arrested the three sons.

17. Upon cross examination, he said that he preserved the scene and then took photos and the body. He found about 40 people at the scene and more arrived later and the crowd was calm. The members of public were just talking but they refused to record statements. They mentioned a panga and nothing more.

18. **PW7 Dr. Alex Makau** from Makueni Referral hospital introduced himself and stated his qualifications. He conducted the postmortem and filled the postmortem report which he produced as **Exb 4**. The findings were as follows;

- Deep cut on the right side of the head (centre) 13cm x 1cm x 4cm (deep long). It extended to the bone.
- A slit throat which was deep on the neck. It extended to the neck bones. It was 12cm x 1cm x 5cm.
- The cut went through the neck. Trachea was completely severed.
- Food pipe completely severed. There was blood in the trachea. Neck veins were completely cut.
- Cut on the head.

The cause of death was respiratory failure secondary to severed throat and lung collapse. The lung collapsed due to the slit trachea. There was excessive blood loss from the cuts.

19. The prosecution case was closed at that juncture and the accused was placed on his defence. He elected to give a sworn statement and not to call any witnesses.

20. In his sworn defence the accused testified that the deceased was his mother. On 20/12/2018, he took tea in his house and then proceeded to the shamba. He harvested one sack of sukuma and two buckets of tomatoes. He then returned home, washed, changed clothes, sold his produce in people's homes and then went to the market where he stayed upto 5.00pm. He later went to the club for a drink and left for home at 7.00pm. At home he found people asleep. His wife opened for him after which he ate and slept. His brother Mwaka woke him up at night and told him that their mother had been killed. His (accused's) house is about 200 metres from that of his mother.

21. They proceeded to the scene and found Agnes Mweli. The deceased's body was between her house and the kitchen. She had an injury on the head and neck. They agreed to wake up their brother Musyoka (PW2) and on the way; they saw the footmarks of Mr. and Mrs Mwoka and Nzioka. Musyoka was given the news and responded that the home issues had been resolved and he would not be going there.

22. Mwoka and Nzioki were shocked and returned to their mothers' home. Mwoka (PW1) called the village elder who arrived with others. Mwoka and Nzioki proceeded to Kavumbu police station at 3.00am and he (accused) remained at home. The police arrived at 7.00am, did their work and left with the body. Later, they were told to go and record statements. He was locked up at Kavumbu police station with his brothers Mwoka, Nzioki and Musyoka. They were called in turns.

23. The drunk OCS went to the cells where he beat him and forced him to admit to the charge. He was kept at the cells for six months for no reason. He denied killing his mother.

24. In cross examination by learned counsel Mr. Kihara for the prosecution he said that their shamba is big. He added that all his brothers plus himself are married with children. He is the 3<sup>rd</sup> son and him and the deceased loved each other. They never had quarrels and he never threatened her at any point. On the material evening he went to a bar at the market where he was known, and took two bottles of allsops and went home arriving at 9pm. He was riding slowly since it was dark and the road was bad. He didn't know what his brothers told the police. He admitted to owning a panga at home and that the injuries on the deceased were caused by a sharp object. The footsteps were going to Musyoka's (PW2).

25. He denied utilizing the homeland as he had his own shamba. He said it is his brothers who caused problems because he worked well with the deceased. He had no issues with his brothers, but they were jealous of him. The administration never went to solve any problem in the family. He did not meet anyone on the way after leaving the club. He was at the station when the deceased was buried. He was implicated because his brothers hated him. His wife used to assist the deceased.

26. After the close of the defence case both counsel filed their submissions.

27. Relying on the evidence of its witnesses, learned Prosecution Counsel, Mr. James Kihara, submits that the circumstantial evidence adduced established all the elements of the offence of murder. He contends that the arguments and threats to kill are strong indicators that the accused murdered the deceased. He submits that the accused did not call witnesses to corroborate what he said in his defence.

28. Relying on section 111 of the Evidence Act, he submits that the accused did not rebut the prosecution evidence but merely replied in opposition of what they had accused him of. That the accused did not give reasons as to why his brothers were jealous of him. Mr. Kihara wonders whether PW5 was also jealous of the accused.

29. The accused, through learned Counsel Mr Judah Kioko, submits that in order to secure a conviction on a charge of murder, the prosecution has to prove that; the death of the deceased occurred, that the accused committed the unlawful act which caused the death of the deceased and that the accused had malice aforethought. He acknowledges that the death of the deceased has been proved.

30. On the second ingredient, he submits that the circumstantial evidence presented by the prosecution is doubtful and does not justify the drawing of the inference of guilt. He contends that the circumstantial evidence taken cumulatively does not form a complete chain hence there is escape from the conclusion that within all human probability, the crime was committed by the accused.

31. He submits that the alleged confession was not done according to the relevant law and procedure hence it should be treated as a rumour devoid of any probative value.

32. On the third ingredient, he relies inter alia on the case of **Roba Galma Wario –vs- R (2015) eKLR** where the Court held that;

***“For the conviction of murder to be sustained, it is imperative to prove that the death of the deceased was caused by the appellant and that he had the required malice aforethought. Without malice aforethought, the appellant would be guilty of manslaughter, as it would mean the death of the deceased during the brawl was not intentional.”***

33. He finally submits that no evidence was led to prove malice on the part of the accused and that the mere mention of a land case, that was never reported, cannot be said to be malice on the part of the accused.

### **Analysis and determination**

34. Murder is defined under section 203 of the penal code as:

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

35. As correctly submitted by the accused's Counsel, the prosecution has to prove the following three ingredients in order to secure a conviction for the charge of murder;

- a. That the death of the deceased occurred and what caused it.
- b. That the death was caused by an unlawful act of commission or omission by the accused (*actus reus*).
- c. That the accused had malice aforethought as he committed the unlawful act (*mens rea*).

### **Proof of death**

36. PW1, PW2 and PW4 found the deceased at the scene already injured and the post mortem report confirms her death. The report also indicates that PW2 was one of the people who identified the body. Further, the defence does not dispute the death. Accordingly, the deceased's death was sufficiently proved.

### **Proof that the death was caused by an unlawful act committed by the accused.**

37. This case is purely based on circumstantial evidence as there was no eye witness. The Court of Appeal, in **Abanga alias Onyango –vs- Rep Cr. A No.32 of 1990(UR)**, set out the principles to apply in order to determine whether the circumstantial evidence adduced in a case is sufficient to sustain a conviction. These are:

***“It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: (i) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established, (ii) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused; (iii) the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.”***

Also see **Sawe v Republic [2003] eKLR R vs Kipkerring Arap Koske & 2 others [1949] EACA 135; Simoni Musoke v R [1958] EA 71;**

38. It appears that the deceased’s murder was executed with absolute precision because despite the proximity of her house to those of her sons, no one heard anything. PW1 testified that there was blood all over thus indicating that the murder took place in her own compound.

39. PW1, PW2 & PW5 painted the accused as a very disgruntled son as he clashed with his mother over the *shamba* and *ntheo* goats. There was also evidence that when the sons were asked to produce their *pangas*, the accused did not produce his usual *panga*. In my view, this evidence creates suspicion against the accused but the rule is that suspicion, however strong, cannot be the basis of a conviction. (See **Sawe v Rep (supra)**).

40. It is clear from the evidence that there were several people in the compound on the night of the murder yet there is nothing really incriminating against the accused to enable this Court to conclude that within all human probability, the crime was committed by the accused and none else. It is trite that whenever the Court is in doubt, that doubt should be exercised in favor of the accused person. Further, I do agree with the accused’s Counsel that indeed, there is no confession which can be relied on by this Court.

41. PW3 is a whole chief inspector of police, who seemed not to know the place of the Judges Rules in the recording of confessions. He relied on the DCIO Makindu and OCS Makueni on this but they let him down. Its not clear if he wanted them to come and record the confession for him. Be it as it may in view of the weak circumstantial evidence the confession could have been of a lot of assistance to the prosecution case.

42. From the evidence on record its not only the accused who was a suspect. It was him and his brothers. That being the case the prosecution ought to have presented evidence that pointed to none other than the accused person as the one who killed the deceased. This kind of evidence is lacking. This is an offence that was committed on the deceased’s compound which is surrounded by her sons’ houses. Does it mean she never even screamed as she was brutally attacked? Its unlikely.

43. The accused in his defence has explained his movement on the material night. This evidence has not been rebutted.

44. The totality of the foregoing is that the prosecution failed to establish that the accused committed an unlawful act which caused the death of the deceased. In the circumstances, the question of *mens rea* does not arise.

45. For my part I find the prosecution case not proved to the required standard. The accused will benefit from the doubt hanging in my mind. I therefore find the accused not guilty and acquit him of the charge of murder under section 322(1) of the criminal procedure code. He shall be released forthwith unless lawfully held under a separate warrant.

**Dated and signed this 19<sup>th</sup> day of May, 2021 at Milimani Nairobi by**

**H. I. ONG’UDI**

**JUDGE**

**Delivered this 16<sup>th</sup> day of June, 2021 in open court at Makueni by**

**GEORGE DULU**

**JUDGE**