



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MURANG'A

CRIMINAL CASE NO. 16 OF 2013

REPUBLIC.....PROSECUTOR

VERSUS

CHARLES MWANGI WAIRIMU.....ACCUSED

JUDGMENT

1. The lifeless body of Virginia Wanjiru (hereafter *the deceased*) was discovered off a footpath near Githika River. She was strangled with a *shuka* and blood was oozing from her mouth.
2. The accused was her friend and main suspect. 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 are that on 6th September 2013 at Gathiani Sub-location, Makomboki Location within Murang'a County, he murdered the deceased.
4. He pleaded *not guilty*. The prosecution lined up *nine* witnesses.
5. PW1 was Peter Mugane. On the previous day he and Hanna Wairimu met the deceased as they were walking home. It was at Githika River near Gathiaini Trading Centre. The deceased was heading in the opposite direction but on the other side of the road. The witness learnt the following day that the body of the deceased was found near the river. He went to the scene and saw it covered in a *lesso*.
6. PW2 was Joel Mukuru. He was away in Nairobi when he received a call from his cousin, Martin Muchiri, informing him that the deceased was murdered. The material part of his evidence was that he bought the deceased a mobile phone make *Forme* as per the receipt dated 20th December 2012 (exhibit 1). The receipt was in his name. The cellphone was produced as exhibit 2. I will return to that subject shortly.
7. PW3 is the deceased's father. The deceased was living with him. On 6th September 2013, at about 6.00 p.m., he was waiting for her at his workplace. He tried in vain to reach her on the cellphone. The deceased never returned home that night.
8. On the following day, they started to search for her. One of the persons he contacted was PW1 who informed him that he saw the deceased the previous evening. PW3 and his wife reported the disappearance at Makomboki Police Station. At about 4.00 p.m., and while still at the police precincts, they learnt that the the body had been discovered.
9. He proceeded to the scene. He said the deceased's mouth was gagged with a *shuka*. The body was about 50 feet from a foot-path, and about 750 metres from the nearby road.
10. PW4 worked in a hair salon with the deceased. The deceased was running a neighbouring hair salon. According to her, the deceased and the accused were friends but she did not know whether they had a romantic relationship. She said the accused was married and lived at Gatuiyaini.
11. She testified that on 6th September 2013, the deceased told her that the accused stole her mobile phone make *Bird* and Kshs 500 from her salon. The cellphone belonged to the deceased's brother. The deceased recovered the cellphone from the accused. She told the witness that the accused had threatened her with a knife. The Kshs 500 was recovered from the accused through the intervention of a village elder (PW5).
12. Joseph Mbote (PW6) is a cousin to the deceased. He and Elias Kamau (PW7) identified the remains of the deceased for postmortem purposes at Githumu Hospital mortuary on 11th September 2013.

13. PW8 was Sergeant Katuyi. He was the investigating officer. He went to the home of the accused on 8th September 2013 but did not find him. He did not also trace him at his place of work at Gatuyaini. On 20th September 2013, he and Police Constable Emase went to Nairobi where they arrested him along River Road. The accused had a mobile phone make *Bird*.

14. They detained him at Kamukunji Police Station. They later escorted him to Kangari when he disclosed that he had sold the other phone make *Forme*. The latter was recovered from one Patrick Njuguna on 21st September 2013. The witness asserted that it is the accused who sold the phone to Njuguna. He produced the receipt for Kshs 2,200 (Exhibit 1) and the cellphone (Exhibit 2). He also produced the package for the *Bird* phone as exhibit 3.

15. Dr. Gachiri (PW9) conducted the postmortem examination. He testified that the trachea was full of blood and there were bruises on the vagina. The cause of death was *strangulation*.

16. When the accused was placed on his defence, he opted to make an unsworn statement. He denied killing the deceased. He stated-

On 6/8/2013....someone came and claimed I owed him money. He was accompanied by some men. She claimed I had his money and a phone which I denied. They searched my house and recovered nothing. The lady then said I had her Kshs 540. I gave her to avoid conflict.

On 7/9/2013 I went home. Someone (Harun Mwangi) called me on Monday and Wednesday. He sent me some fare through my phone. I called my cousin Lucy and we met at Tea Room, Nairobi. The two of us met Harun and we went to Simba Centre but when we went in two men (policemen) took my phone and I was taken to Kamukunji Police. They alleged that I killed the deceased. It is not so.

17. Learned counsel for the accused filed written submissions dated 30th April 2021 with authorities annexed.

18. 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*.

19. There are three key ingredients that *must* be present: 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*.

20. There is no doubt about the death of the deceased. Doubt is completely erased by the post mortem report (Exhibit 4). In the opinion of the pathologist, the deceased was *strangled* to death.

21. From that evidence, I find that the death was unlawful. The live question then is whether the Republic has proved beyond reasonable doubt that the accused, *of malice aforethought*, killed the deceased.

22. There was no eye witness. The prosecution's case is entirely built on *circumstantial* evidence. In order to convict on such evidence, the entire chain must be complete and point to the guilt of the accused "*incapable of explanation upon any other reasonable hypothesis than that of his guilt*". **R v Kipkering arap Koske & another** 16 EACA 135 (1949). 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.

23. The incriminating evidence can be classified into four: Firstly, that the accused and the deceased were friends though it is not clear if they had a romantic relationship. Secondly, from the evidence of PW4, and partly admitted by the accused, on 6th September 2013, the accused stole or took a mobile phone make *Bird* and Kshs 500 or thereabouts from the deceased's salon. According to PW4, the deceased later recovered the cellphone from the accused and told her that the accused *threatened* her with a knife. The Kshs 500 was recovered from the accused through the intervention of a village elder (PW5). The accused on the other hand said that he only gave her "*Kshs 540 to avoid conflict*". He said that when his house was searched, nothing of substance was recovered.

24. The third incriminating piece of evidence is from the investigating officer PW8. It suggests that another cellphone make *Forme* gifted to the deceased by her brother PW2 was *sold* by the accused to a person named *Njuguna* a few days after the murder. The trouble with that evidence is two-fold: that *Njuguna* never took to the stand; and, the connection between it and the murder is tenuous. I say so noting the evidence of PW4 who confirmed that the accused and deceased were friends.

25. The fourth element relates to the motive. The combination of the evidence of PW4, PW5 and PW8 suggests that the conflict between the accused and deceased over the theft of the cellphone or loss of Kshs 500 motivated the murder. I remain alive that the Republic is *not* obligated to prove motive.

26. Unfortunately, the evidence of PW4, PW5 and PW8 does not reach the threshold of proof *beyond reasonable doubt*. The totality of their evidence raises strong *suspicious* against the accused. But there is no *concrete* evidence that the accused was the killer.

27. The demeanour of the accused betrayed him as untruthful and one who was concealing vital information. But our criminal justice system places the *burden of proof* entirely upon the shoulders of the prosecution. **Woolmington v DPP** [1935] AC 462, **Bhatt v Republic** [1957] E.A. 332.

28. I have reached the conclusion that the entire corpus of circumstantial evidence does not *irresistibly* and *exclusively* point to the guilt of

the accused. *R v Kipkering arap Koske & another* [supra], *Sawe v Republic* [supra]. I cannot then say with confidence that all the elements of the charge have been laid out; or, at any rate that the accused, of *malice aforethought* killed the deceased.

29. I accordingly enter a finding of *not guilty*. The accused person is hereby *acquitted*.

It is so ordered.

DATED, SIGNED and DELIVERED at MURANG'A this 6th day of July 2021.

KANYI KIMONDO

JUDGE

Judgment read in open court in the presence of-

Accused.

Mr. Kirubi for the accused.

Ms. Adera for the Republic.

Ms. Dorcas Waichuhi and Ms. Susan Waiganjo, Assistants.