



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MURANG'A
CRIMINAL CASE NO. 28 OF 2012
[FORMERLY NYERI HCCR NO. 56 OF 2009]
REPUBLIC.....PROSECUTOR
VERSUS
JORAM MWAURA KIMANI.....ACCUSED
JUDGMENT

1. On the night of 15th November 2009, Margaret Wanjiru Irungu (hereafter *the deceased*) died from a stabwound to her chest. According to her son, Waiguru, the deceased was knifed by the accused.
2. The Republic brought *Information* to the High Court charging the accused with murder contrary to section 203 as read with section 204 of the **Penal Code**.
3. The particulars are that on the above date at Nguthuru village, Murang'a South District within the former Central Province, he murdered the deceased.
4. The accused pleaded *not guilty*. The prosecution lined up six witnesses. The first was Hesborn Waiguru Irungu, the deceased's son. He testified that on the material evening he and his mother were walking home. Suddenly the accused emerged from his home wielding a knife in his right hand and stabbed the deceased. PW1 claimed that his left arm was injured and could barely help the deceased.
5. He screamed prompting his father (PW2), his brother Simon Ngahu and another lady, Wanjeri, to come to the scene. He stated that the accused attempted to run away but was apprehended by people who were nearby. PW1 said that he removed the knife from the deceased's body and gave it to his father who kept it in the house.
6. Their neighbour, Kararu, helped to take the deceased to hospital in his pick-up. He was accompanied by Wanjeri. PW1 said that neither he nor his father accompanied the deceased to hospital. They learnt later that the deceased had succumbed to the injuries the same night.
7. PW2, David Irungu Ngahu, was the deceased's husband. He found the deceased in a ditch and asked her what had happened to which she responded that the accused had stabbed her. The accused was not at the scene. When examined further he said-

 “My son Waiguru [PW1] gave me a knife as we took the deceased to hospital. He told me that after Mwaura [accused] stabbed the deceased the knife fell there and he picked it up....”
8. PW3 was Gladys Wamuhu Ndung'u. She also responded to the screams coming from direction of the road. She saw four people: the deceased, the accused, Kamande and PW1. That the accused was seated between the deceased and Kamande who appeared to be restraining him from escaping. She said that PW1 was standing in front of the three holding a knife.
9. PW3 added that both the deceased and the accused had suffered injuries: the deceased was bleeding from the chest while the accused was bleeding from the head. The witness claimed that PW1 was threatening to stab other people. She also said that PW2 threw a stone at them. She testified that the accused was led away by Kahindo (PW4) and his wife, Wanjiru.
10. PW4, Kahindo Kimani, is the accused's elder brother. He took the accused to Kabati Police Station where they reported the incident. They then headed to Thika Level 5 hospital. He said that they encountered a hostile mob outside the hospital who attacked them. They were only rescued by the police. That part of his evidence was confirmed by PW5, Police Officer Elkanah Monga're from Thika Police station.

11. The last prosecution witness was Police Officer Mutuma Duncan. He was not the investigating officer. He admitted in cross-examination that he never recorded a statement. He also conceded that he was neither briefed by the investigating officer, Corporal Omondi, nor studied the witness statements. I must say that I did not find his evidence very useful.

12. The pathologist, Dr. Murage, was unavailable. However, his post mortem report dated 23rd November 2009 was admitted into evidence under section 77 of the **Evidence Act**.

13. When the accused was placed on his defence, he denied stabbing the deceased. He said that a son of the deceased, Kamande, cut him on the head in an unprovoked attack. As he ran away, the deceased emerged and grabbed him from the front. According to the accused, it is the deceased's other son, Hesbon Wairagu (PW1), who stabbed his mother as she wrestled with the accused. He said there was a grudge between him and the family of the deceased for reporting them to the police about their illicit trade in bhang.

14. The material part of his testimony went as follows-

I returned to Githuru Village at 6.30 p.m. When I got there, I met Waiguru and Kamande. They are brothers. Kamande cut me on the forehead on the left side. I had not spoken to him. When I turned around he cut me on the head again. As I ran, I met deceased who held me. I tried to resist. It was on the road. Waiguru came and knifed me on the left thigh. As I turned to avoid the knife, he cut the mother (deceased). It is Waiguru who cut the deceased. Both of us fell.

I was bleeding on the forehead. Isaac Irungu came to the scene. Also my relatives Gladys Wamuhu (PW2) Kahindo Joseph (PW4). Wamuhu separated us with the deceased. Waiguru ran away. He testified as PW1. The knife that was marked (MFI P1) but not produced. Kahindo (PW4) found me up [sic] and as I entered my compound. I left deceased with her sons.

Isaac Irungu (husband of deceased) emerged with stones during the commotion. I never saw him with a knife or holding the knife. I went to Thika Hospital. I found the deceased's relatives who beat us again. Deceased and her husband were trading in bhang. I had informed the chief on 1.10.2019. They attacked me as an informer.

15. On cross-examination, the accused insisted that the deceased grabbed him as her sons attacked him. He was categorical that it was PW1 who stabbed his mother.

16. Learned counsel for the accused opted *not* to make final submissions.

17. 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*.

18. 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*.

19. There is no doubt about the death of the deceased. Doubt is completely erased by the post mortem report (Exhibit 1). The cause of death was *"a penetrating chest injury to the left lung and left ventricle"*.

20. 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.

21. The key witness was PW1. His version of events was that the accused suddenly emerged from his house and stabbed the deceased in the chest saying that he (the accused) had desired the deceased for a long time. But PW1 omitted to mention that his brother, Kamande, had first attacked and stabbed the accused on the forehead.

22. PW4 confirmed that when she got to the scene she saw the accused bleeding on the forehead while the deceased was bleeding from the chest. I find it odd that neither Kamande nor his brother Ngahu who were both at the scene recorded statements with the police or testified at the trial about the death of their mother.

23. According to the accused, he met PW1 and Kamande. Kamande cut him on the forehead in an unprovoked attack. As he turned around he received a second cut on the head. When he tried to escape, the deceased held him from the front. That is when PW1 knifed him on the left thigh. As the accused turned to avoid the knife, PW1 cut his own mother.

24. The accused's version of events may *not* be entirely candid. But it casts some *doubt* on the prosecution's case. Was it him or PW1 (a son of the deceased) who stabbed the deceased? Why did Kamande (another son of the deceased) attack and stab the accused? Was it, as claimed by the accused, a revenge mission for exposing their illicit trade in drugs to the area chief?

25. As I have said, Kamande did not testify at the trial. PW2 arrived at the scene well after the attack. The *deceased* told *him* that she was stabbed by the accused. *Dying declarations* are admissible under section 33 (a) of the **Evidence Act**. However, they should be treated with *caution*; and, there is need for *corroboration*. See **Pius Jasunga Okumu v Republic** (1954) 21 EACA 333, **Chogo v Republic** [1985] KLR 1. The statement by the deceased was only heard by PW2 and not by any other witnesses including PW3, Kararu or wanjeri. I thus find that there was insufficient corroboration and decline to admit it in evidence.

26. PW2 did not come across as a reliable witness. My predecessor, *Waweru J*, who took PW2's evidence put it on the record that he was *"a difficult witness refusing to answer faithfully simple and direct questions"*.

27. There were also material discrepancies in the evidence of PW1 and PW2. For instance, PW2 said he did not find the accused at the scene contrary to PW1 who said that the accused had attempted to flee but was apprehended by people nearby when his father (PW2) came to the scene.

28. The issue of who had the knife and stabbed the deceased is contested. Although a knife was marked for identification, it was never produced at the trial. PW2 said the murder weapon was an ordinary kitchen knife. PW1 on the other hand said that it “*looked like a knife for slaughtering cows..sharp on both edges...thin not broad*”.

29. According to PW2, he got the knife from PW1 after returning from the hospital. He said as follows-

After we came from hospital Waiguru (PW1) gave me the knife. Ngahu was present when PW1 gave me the knife. PW1 had the knife all along when we took the deceased to hospital and when we reported the matter to police at Thika Police Station before and after the deceased died.

30. PW1 said that neither he nor his father (PW2) accompanied the deceased to hospital at Thika. But according to PW2’s testimony above, PW2 and his brother Ngahu had accompanied him to Thika when they took the deceased to hospital. PW1 had stated-

A neighbour called Kararu then came in his motor vehicle, a small pick-up truck. He took the deceased to hospital in the company of Wanjeri. I and my father and brother did not accompany the deceased to hospital. At about 10 -11 p.m. we were informed by telephone that the deceased had died.

31. There is another discrepancy. According to PW1, he removed the knife from the deceased’s body and gave it to his father PW2. He said that “*it was not immediately at the scene but at home. That is where I gave him the knife*”. But from the testimony of PW2 above, he got the knife from PW2 as they travelled back from the hospital. In his statement to the police, PW2 had stated that the knife was on the ground at the scene and that PW1 picked it up and gave it to him.

32. The complete absence of a *motive* casts further casts doubt about the culpability of the accused. I am alive that the prosecution was *not* obliged to prove motive. But its *absence* casts some doubt on the *intention* of the accused. **Nzuki v Republic**, Court of Appeal, Nairobi, Criminal Appeal 70 of 1991 [1993] eKLR.

33. The prosecution is obliged to *prove* the *mens rea* for murder: that the accused was of *malice aforethought*. See **Nzuki v Republic** [supra]. In a synopsis, the two key ingredients of *actus reus* and *mens rea* have not been proved beyond reasonable doubt.

34. The accused may have lied; or, even concealed some vital information. But our criminal justice system places the *burden of proof* entirely upon the shoulders of the prosecution. See **R v Kipkering arap Koske & another** 16 EACA 135 (1949), **Woolmington v DPP** [1935] AC 462, **Bhatt v Republic** [1957] E.A. 332.

35. Granted the evidence, I *cannot* say with confidence that all the elements of the charge of *murder* have been laid out; or, at any rate that the accused, of *malice aforethought* killed the deceased.

36. 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 holding brief for Mr. Mwangi Ben for the accused.

Ms. Adera for the Republic.

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