



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MURANG'A**

**CRIMINAL CASE NO 38 OF 2012**

**(FORMERLY NYERI HC CRIMINAL CASE NO 5 OF 2011)**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**STEPHEN NJAMBUYA MAKURATHI.....ACCUSED**

**J U D G M E N T**

1. The Accused in this case, **STEPHEN NJAMBUYA MAKURATHI**, is charged with *murder* contrary to **sections 203 and 204** of the *Penal Code*. It is alleged in the information dated 09/02/2011 that on 03/02/2011 at Rurie Sub-location in Murang'a-North District within Central Province, he murdered one **TERESIA MUTHONI MAKURATHI**.
2. The Accused pleaded not guilty and was tried. The prosecution called 7 witnesses. The Accused elected to give sworn testimony. He did not call any witnesses.
3. The Deceased was the Accused's mother. He lived within her compound. PW1 (**Grace Njeri Makurathi**) is an elder sister of the Accused. PW2 (**Samuel Kaimba Makurathi**) is the Accused's twin brother.
4. PW3 (**Dr Raphael Gachiri Wanjau**) produced the *post-mortem* report prepared and signed by one Dr Samuel Warui who could not be found to come and testify. PW3 also produced the mental assessment report of the Accused prepared and signed by a Dr James M Mburu who could not be procured to come and testify.
5. PW4 (**Frasia Wanjiru Ngondi**) is another elder sister of the Accused. Her main testimony was that she identified the Deceased's body to the doctor who performed the *post-mortem* examination.
6. PW5 (**Peter Manyeki Kamau**) was a neighbour of the Deceased and Accused. PW6 (**Cpl Eric Kithinji**) was a *scenes of crime* officer who took, developed and printed a number of photographs of the scene of murder and body of the Deceased, *inter alia*. He produced in evidence the photographs and appropriate certificate under **section 78** of the *Evidence Act*.
7. PW7 (**Cpl Stephen Mboroki**) was the investigating officer of the case. He and other officers arrested the Accused. He produced in evidence a number of exhibits.
8. The prosecution case was as follows. In February 2011 both the Accused and PW2 lived in their mother's (the Deceased's) compound. Both were married and lived in their separate houses within the compound with their respective wives. Their sister, PW1, also lived in the Deceased's home.
9. On 03/02/2011 at about 10:30 am PW2 left his house and went to the Deceased's house. He found the Deceased and the Accused sitting down. PW2 also sat down. The Deceased then told PW2 that the Accused was telling her to go and bring back his (Accused's) wife from her home nearby. She had run away about a week before. She had previously ran away about two times and the Deceased had assisted on one occasion to bring her back. PW2 testified that the Deceased advised the Accused to work and earn some money to shop for his wife when she came back. He agreed. PW2 then gave him, at the Deceased's instructions, a jembe and a spade. He went off nearby to dig up building sand for sale.
10. PW1 had found the three (Deceased and her two sons) talking. According to her the Deceased had declined to spend her money to go and get back the Accused's wife, saying that he should go get back his wife himself.

11. PW2 then went away on his motor bike. The Deceased was left with PW1. PW1 then went away to the local trading centre to get treatment at a mobile clinic and left the Deceased at her home alone.
12. At about 4.00 pm PW1 went back to the Deceased's home. She found the Deceased's body lying outside near the door of her house. She had injuries on her head. There was blood all over. There was no one else in the compound.
13. PW1 started screaming while standing some distance from the body. She saw a panga about a meter from the Deceased's body. She knew the panga to belong to the Deceased. Neighbours came in response to PW1's screams. The local chief also came and she called the police on her mobile phone. They came after about 30 minutes. The Accused was nowhere to be seen.
14. PW1 further testified that eventually the Accused was discovered in a bush nearby and arrested. She was not present. He was brought back home. The police then took him and the Deceased's body away. Finally, PW1 testified that there had been frequent quarrels between the Deceased and the Accused over his demands for money and for the Deceased to go for his wife whenever she ran away to her home.
15. In cross-examination PW1 stated she did not know who had injured the Deceased. Neighbours had gone to look for the Accused who was found in the bush at the bottom of their shamba. She was herself not present when he was found and arrested. She had slept at Sagana the previous night where she had gone to visit her sister. When she came home she had found the Accused wearing his green trouser.
16. PW2 testified that when he left the Deceased at her home to go to the local trading centre on his motorbike, the Accused was already digging up sand about 30 meters from the Deceased's house. At about 4 pm while at the centre a neighbour called him on his mobile and told him that he was needed at home urgently. He ran home, about 20 minutes away.
17. From a distance he saw people in the neighbouring shamba. At his home he found the Deceased's body outside her house near the door. There was a lot of blood around her. He saw a deep wound at the back of her neck. She appeared dead. He also saw a pair of green sleepers about a meter from the Deceased's body. He recognized the sleepers as belonging to the Accused. The Accused had been wearing them when he left him digging up sand that day. He had also been wearing them as he (PW2), the Deceased and the Accused were talking earlier outside the Deceased's house. The Accused had also been wearing a green pair of trousers which he identified in court.
18. PW2 also testified that near the Deceased's body he saw a bloody panga which belonged to the Deceased. He identified it in court. He was then accompanied by a neighbour to the local police post where he reported the matter. Two police officers accompanied them back home where they found other police officers had already arrived.
19. As the police were preparing to take away the Deceased's body, a young boy came and said that he had seen the Accused in the bushes on the lower side of the shamba. PW2 and others (including some police officers) went towards the bushes. The Accused then emerged from the bushes and came towards them. He was then arrested. He was wearing white shorts and a tee-shirt. He was bare-footed. He then led the police to a place in the bushes where a blood-stained green trouser was recovered. It was the trouser he had been wearing earlier in the day.
20. Finally PW2 testified that there were no major previous quarrels between the Accused and the Deceased. He (PW2) had no quarrel with the Accused.
21. In cross-examination PW2 denied that the green sleepers found near the Deceased body were his. He said they belonged to the Accused. He was not present when the Deceased was killed. He found the Deceased's body alone. He saw the panga and sleepers near the body. Earlier in the morning the Accused had been wearing the green trouser and a white/black striped shirt. When he was arrested he was wearing white shorts and a tee-shirt. It was the Accused who led the police to where the green trouser was recovered.
22. PW5 was a neighbour of the Deceased and had grown up with the Accused. He was one of those who were attracted to the Deceased's home by the commotion there. He was also among those who went to look for, but met with, the Accused as he emerged from the bushes. He was present when the Accused led the police to the place in the bush where they recovered the green trouser, which he identified in court. He stated that he had seen the Accused wearing that trouser many times before.
23. The *post-mortem* report produced by PW3 as **Exhibit P4** showed that the Deceased died from *cardio-pulmonary arrest* due to a **severe head injury** caused by a **sharp-force trauma**. The injury, as per the *post-mortem* report, was –
- “...one huge and deep cut cross-sectionally at the region of the occiput that extended all the way through the skull and through the occipital cortex to midway through the brain (taken coronally).”**
- Looking at the photographs produced in evidence by PW6, it was easy for the witnesses to observe, mistakenly, that the injury suffered by the Deceased was to the back of the neck. The *post-mortem* report indicates it was to the very back of the skull.
24. PW7, as already noted, was the investigating officer. He was among the police team that first responded to the report of the murder. At the scene he and his colleagues found the body of the Deceased lying outside her house on its belly. The body had a deep cut wound on the back of the neck.
25. Besides the body there was a panga, an old pair of sleepers and other items. After the body was taken away PW7 and two other officers were left at the scene carrying out investigations, in the course of which the sleepers were identified by PW2 and PW1 as belonging to their brother, the Accused.
26. PW7 and the other officers then received information that the Accused had been spotted in the bush about 300 meters away. As they moved towards that direction they met him as he moved towards the Deceased's home. They arrested him. He was wearing a pair of shorts.

The Accused then led them to a place in the bush where they recovered the blood-stained green trouser that PW7 produced in evidence (**Exhibit P2**). He also produced in evidence the panga that was near the Deceased's body (**Exhibit P1**) and the green pair of sleepers (**Exhibit P3**).

27. PW7 was also present at the post-mortem examination of the Deceased's body. A blood sample was collected from the body for DNA testing and given to him. He prepared an Exhibit Memo Form and took the blood sample together with the green trouser and the panga to the Government Chemist for analysis. He produced in evidence the Exhibit Memo Form in evidence (**Exhibit P7**). On 19/06/2012 he received the Government Analyst's report which he produced in evidence as **Exhibit P8**.

28. Exhibit P8 reported that the panga (**Exhibit P1**) was slightly stained with human blood; and the green trouser (**Exhibit P2**) was moderately stained with human blood. The DNA profiles generated from the blood stains on both the panga and the green trouser matched those of the Deceased.

29. In his own defense the Accused testified under oath. He did not call any witness. He was lucid and clear in his testimony. He testified to his being with PW1, PW2 and the Deceased at the Deceased's home, just as PW1 and PW2 had testified. He said he then went to where he was digging up building sand for sale, not far from his house, and was there until about 6.00 pm. As he was going back home he met with some people who looked like police officers. They arrested him, alleging that he had killed someone. They told him that he had killed his own mother. He told them that he had not killed his mother. They then took him to a white car and took him away.

30. The Accused further testified that he did not know anything about the clothes produced in evidence. He also did not know about what his brother and sister had said in court. He remembered a panga was produced in court. He saw it in court. He asked to be released because he had suffered in prison.

31. In cross-examination the Accused agreed that he was living with the Deceased at her home compound in Kabuta. He had his own house in the compound. At first he denied that he had a wife and stated that he had never married. He then said that indeed he had a wife who had one child, but that she had left and gone back to her home because she was sick. He and she never quarreled, and he never beat her. He wanted her to come back to him; but he never wanted the Deceased to go and bring her back.

32. At first the Accused stated that where he was digging up sand he was with other people like **Mwangi** and **Kamau**. Then he changed and said that he was alone. When he was arrested, the Accused further said in cross-examination, he was wearing a trouser, work shorts and other clothing. At home there had been at least three pangas, and he knew where they were all kept.

33. In answer to questions asked by the court, the Accused said he did not know that this case concerned the murder of his own mother; he did not know what the case was about. He further stated that as he stood in the dock he did not know if his mother was dead or alive. He did not know what kind of relationship there was between himself and his brother and sisters who testified in court. He had never quarreled with any of them. He would never falsely testify against them. He did not suggest any reason why they would testify falsely against him. He reiterated that he did not know if his mother was dead or alive. He did not know why she has never gone to see him in jail.

34. The court keenly observed the Accused as he testified, and indeed throughout the trial. He never once appeared confused or unaware of what was happening. He was medically certified fit to plead and stand trial. He testified clearly and answered questions after pauses that suggested deliberation to give answers that would take the court in the direction he wanted. He did not strike the court at all as unaware of why he was in court charged with the murder of his own mother. He was simply putting up an act!

35. The prosecution case against the Accused is purely circumstantial. No known person witnessed the murder of the Deceased, and no witness saw the Accused inflict upon the Deceased the injuries that caused her death.

35. PW1 left her mother alive and well at her own home about mid-day or thereabouts. The Accused was then digging up sand nearby. When she came back at about 4 pm she found her lifeless body lying outside her house with a fatal wound to the back of the head. The Accused was nowhere to be seen. Her screams of distress attracted neighbours, one of whom alerted PW2 by mobile phone. PW2 was at the nearby trading centre. He ran home and found the horrific sight of his mother's body lying lifeless outside her house. The Accused was then nowhere to be seen.

36. So, who killed the Deceased? To begin with, the Accused's sleepers, which were well-known to PW1 and PW2, and which he had been wearing earlier that day, were found next to the body of the Deceased. After his arrest the Accused led the police to the spot where the green long trouser he had been wearing that day was. The trouser was moderately stained with what appeared to be blood. Analysis by the **Government Chemist** found that it was the Deceased's blood that had stained the Accused's trouser.

37. The question then naturally arises: how did the Deceased's blood get onto the Accused's trouser? He offered no explanation at all as to how his mother's blood got onto his trouser.

38. The only inescapable conclusion that one can draw from the existing circumstances is that the Deceased's blood got onto the Accused's trouser upon him inflicting on her the severe injury that caused her death.

39. The nature of the injury suffered by the Deceased was such that it was inflicted with the intention of causing her death, or at the very least, causing her grievous harm. It was an injury inflicted with malice aforethought.

40. In the case of **Abanga alias Onyango –VS- Republic, Criminal Appeal No 32 of 1990 (Unreported)** the **Court of Appeal** said the following about circumstantial evidence –

***“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; and (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.”***

Put in other words, the proved circumstances must irresistibly point to the guilt of the accused, and be incapable of explanation upon any other hypothesis but the guilt of the Accused.

**41.** I am satisfied beyond reasonable doubt that the circumstances outlined above which have themselves been proved beyond reasonable doubt, irresistibly point to the guilt of the Accused herein in the murder of his own mother. Those circumstances are incapable of explanation upon any other hypothesis but the guilt of the Accused. I find him guilty of the murder of the Deceased Teresia Muthoni Makurathi contrary to section 203 as read with section 204 of the Penal Code. I hereby convict him accordingly.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT NANYUKI THIS 3<sup>RD</sup> DAY OF NOVEMBER 2021**

**H P G WAWERU**

**JUDGE**