



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MURANG'A**

**CRIMINAL CASE NO. 6 OF 2016**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**SIMON MURAYA GACHAU.....ACCUSED**

**JUDGMENT**

1. The accused's father made a report to the police that the accused informed him that he "*had killed and left*". When he went to the accused's house, he found a trail of blood and the lifeless body of *Cecelia Wambui Wahome* (hereafter *the deceased*).
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**. The particulars are that on 29<sup>th</sup> August 2015 at Umbui village, Kanjama Location, Mathioya Sub-County within Murang'a County, he murdered the deceased.
3. He pleaded *not guilty*. The prosecution called *seven* witnesses. The first was the deceased's mother, Faith Karanja (PW1). She learnt of the murder from some visitors to her business premises at Mumbi Shopping Centre. She did not know the accused or whether he had an intimate relationship with her daughter. On 30<sup>th</sup> August 2015, she saw the body of the deceased at Murang'a Hospital Mortuary. It had three stab wounds on the forehead.
4. PW2 was Patrick Muiruri. He was informed of the homicide by his sister, PW1. On 7<sup>th</sup> September 2015, he and PW1 attended the post mortem examination. He said the deceased had stab wounds on the head above the eye, the back and on one leg.
5. Richard Muchiri (PW3) is a village elder. On 29<sup>th</sup> August 2015 at about 10:00 hrs, he received a report from the accused's father, Mwangi Gachau (PW4), that his son had killed his wife. He informed the police who arranged for a scenes of crime officer. When he and the police got to the house of the accused he saw blood leaking from the door. They also saw a bloodstained jembe next to the body of the deceased. The body was on the floor and had stab wounds on the head. That evidence was largely confirmed by the Assistant Chief (PW5) who also visited the scene.
6. Like I stated, PW4 is the father of the accused. He was declared a hostile witness for departing from his initial statement to the police. He said the accused and deceased had cohabited for three months. His material evidence was that the accused informed him he "*had killed and left*". When PW4 went to the accused's house, he found a trail of blood and the body of the deceased.
7. PW6 was Chief Inspector Joseph Mwangi. On 2<sup>nd</sup> March 2016 he received information from Imara Daima Police station in Nairobi that they had arrested the accused for an unrelated offence. The following day, he sent CPL Simon Ekeno (PW7) and PC David Chepkwony to Nairobi to re-arrest the accused. PW6 recorded the accused's statement under inquiry. He produced the fork jembe (exhibit 1).
8. PW7 was Police Constable Ekeno. He was the investigating officer. He visited the scene on 29<sup>th</sup> August 2015 and recovered the fork jembe. The police removed the body to Murang'a Hospital mortuary. He submitted a blood sample and the fork jembe for analysis. From the Report by the Government analyst produced by consent by PW7, "*there are 99.99% more chances that the donor of the DNA profile generated from the bloodstains on the fork jembe (item F) is the biological father to the donor of DNA profile generated from the blood sample (item B) indicated as of deceased's son*".
9. The pathologist was unavailable. However, by consent of the defence and prosecution, the Post Mortem report by Dr. Gachiri dated 7<sup>th</sup> September 2015 was produced by PW7 under Section 77 of the **Evidence Act** (exhibit 4).
10. When the accused was placed on his defence, he made an unsworn statement. I will reproduce it verbatim-

On 29/8/2015 I was at home with Wambui. We got into a disagreement. It was 7.00 a.m. in the morning. She left. I put her clothes in the kitchen. At about 9.00 a.m. she came back and found me in the sitting room. She entered the bedroom and found her clothes missing. She asked me about it. She got angry. She picked a panga and wanted to cut me. I found a jembe and used it to prevent being cut. She got hit by the jembe on left side of her head and she fell on her face. I was also hurt. I was shocked and went to my father. I explained what happened. I decided to go to town to get treatment. On the way, I got a call from my friend who advised me that there were mobs in town that may beat me. I feared and escaped to Nairobi where I was later arrested. I know I have made a mistake.

11. Learned counsel for the accused, Mr. Kagwi, has filed final submissions. He submitted that the accused acted in self-defence or had no intention to kill the deceased. In his view, the charge of murder was not proved.

12. 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.*

13. 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.

14. The legal and evidential burden rests squarely on the Republic. **Woolmington v DPP** [1935] AC 462, **R v Kipkering arap Koske & another** 16 EACA 135 (1949), **Bhatt v Republic** [1957] E.A. 332.

15. There is *no* doubt about the *death* of the deceased. Her body was identified at the mortuary by her mother and uncle (PW1 and PW2). From the pathologist's report, the deceased died from "*external bleeding*".

15. From that evidence, I entertain *no* doubt that the cause of death was *unlawful*. The only live question now is whether the accused person, *of malice aforethought*, killed the deceased.

16. The accused freely admitted at the trial that they had a disagreement with the deceased. They were the only ones in the house. According to his statement, the deceased "*picked a panga and wanted to cut me. I found a jembe and used it to prevent being cut. She got hit by the jembe on left side of her head and she fell on her face*". There is thus no doubt that it is the accused who hit the deceased on the head with the jembe. It is also reinforced by the report of the Government Analyst. The question is whether the accused was acting in self defence or intended to kill the deceased.

17. Although the accused claimed he was injured in the process, it was a bare statement unadorned by evidence. He told PW4 immediately after the incident that he had killed the deceased. I studied the demeanour of the accused closely. He was shifty in his statement and he did not strike me as truthful. The accused disappeared from the *locus in quo* for seven months and was only arrested in Nairobi. He was living with another woman in Nairobi. According to PW6 and PW7, the woman made a complaint at Imara Daima Police Station that the accused had threatened to kill her. That is how the accused was arrested in March 2016. The accused claimed he disappeared because he feared for his life. Why did he not report the matter when he got to safety and for all those months?

18. For all those reasons, I find that the conduct of the accused is inconsistent with his plea of innocence. His claims that he was acting in self-defence is a sham considering the gravity of the injuries: the deceased had multiple stab wounds on her head, back and leg.

19. By employing a fork jembe to stab the deceased on her head and back, he *knew or ought to have known* that it was likely to cause grievous harm or death. He thus had *malice aforethought* as defined in section 206 (b) of the **Penal Code**. The deceased died from *external bleeding* as a direct consequence of the stabbing.

20. The entire corpus of direct and circumstantial evidence points *irresistibly* and *exclusively* to the guilt of the accused. I find *no* defence or hypothesis that exonerates him.

21. The upshot is that the prosecution has proved the charge *beyond reasonable doubt*. The accused, *of malice aforethought* caused the death of the deceased by an *unlawful* act. I accordingly enter a finding of *guilty*. The accused is hereby convicted.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT MURANG'A THIS 2<sup>ND</sup> DAY OF DECEMBER, 2021**

**KANYI KIMONDO**

**JUDGE**

**Judgment read in open court in the presence of:**

The accused.

Ms. A. N. Gakumu for the Republic.

Ms. Dorcas Waichuhi, Court Assistant.