REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CRIMINAL CASE NO 2 OF 2016

REPUBLIC.....PROSECUTOR

VERSUS

MARY WAMBUI KAMAU.....ACCUSED

JUDGMENT

1. The Accused herein, Mary Wambui Kamau is charged with Murder contrary to section 203 as read with Section 204 of the Penal Code. The information states that on the night of 26th and 27th July 2012 at Gatimu village, Kiambu County, she murdered Daniel Gikuru Kironji. She denied the charges and was represented by Mr. Wamwayi. Through seven witnesses, the prosecution presented the following case. Daniel Gikuru Kironji was aged about 56 years in 2012. Together with the Accused, he lived at Gatimu village in the same homestead as his parents but occupying a distinct portion of the home where he had constructed a single-storey house.

2. The deceased was allegedly diabetic and had a wife who resided in the U.S.A. That notwithstanding, he and the Accused had cohabited as man and wife for some years. They lived as a couple in the deceased 's building which consisted of five units or flats. On the ground floor were three units which were occupied by tenants. On the 1st floor were two units separated by a hallway between them and occupied by the couple and a 3rd tenant, respectively. Some of the tenants occupying the ground floor were Anne Wairimu (PW 3) and Nahashon Mwangi (PW2). PW2 also acted as a caretaker of the building. Annah Wangui Ngugi (PW1) was employed as a house-help to the deceased 's mother, whose house stood some 20 metres from the house of the deceased.

3. On the evening of 26th July 2012, the deceased, the accused, PW1 and PW2 and a third person named Ndirangu travelled in the deceased 's car to attend a church service. After the service, the group drove back home, arriving at 10.30 p.m. PW1 and PW2 joined the couple in their house where tea was served, before each person retired to their respective houses, leaving the couple in their house.

4. It is the evidence of PW3 that early on the next day at about 6.30 a.m., she saw the Accused returning from the shops, carrying milk. At 7.00 a.m. while PW3 was preparing breakfast, she was called by the Accused to go upstairs, the Accused allegedly claiming that her basin had been moved. That when PW3 complied, the Accused asked her to go inside her house before the Accused opened the curtain and PW3 then saw the body of the deceased and blood stains. And that upon PW3 stating what she had seen, the Accused started to scream, attracting neighbours, including the area chief Peter Njuguna Kariuki (PW4). PW4 called police, including ACP David Kiprono Rop (PW7), then DCIO Lari arrived and conducted inquiries. It was decided to demolish the external pit latrines which were used by the occupants of the plot. Inside the pit, police retrieved two pillow cases (Exh.1) and a white t-shirt (Exh. 2) which appeared blood stained. These were identified by PW1 and PW3 to belong to the Accused. She was arrested from the home of a neighbor who had sheltered her from an irate crowd.

5. The post mortem examination on the deceased 's body was carried out by Dr. Joseph Ndungu (PW5) on 2nd August 2012. There were found multiple skull fractures on the left temporal region of the head, multiple brain lacerations and a stab wound and bruise to the head. The cause of death, in the pathologist's opinion, was severe head injury secondary to blunt and sharp object trauma. The retrieved pillow cases and white t-shirt (Exh.1&2) were forwarded by PW7 to the government analyst together with the blood samples taken from the deceased, and the Accused. Other items forwarded for examination were a pipe range, and penknife both which on examination did not yield any significant results.

6. However with regard to the white t-shirt and one pillow case marked "6G" in the exhibit memo form, the government analyst, Waithira Oyiengo (PW6) found that they were stained with blood of human origin. Attempts to generate a DNA profile from blood stains on the pillow case marked "6G" were unsuccessful. The second pillow case marked "6F" was not stained with blood. DNA profile was generated from the T-shirt (item "5") matched with the DNA profile generated from the blood sample of the deceased.

7. Upon being placed on her defence, the Accused elected to make a sworn statement but did not call any witness. She testified that she is a lab technologist by profession and previously worked at the University of Nairobi. That she got married to the deceased in 2008 and cohabited with him at Gatimu village in the compound of his parents, occupying a distinct area of the compound. That her in-laws including the deceased's mother and some siblings also lived in the same compound. She described the building she occupied as a single-storey. That

two tenants of the couple resided in the ground floor and one upstairs, which is also where her own residence was located.

8. That there was a hallway separating her own flat and the said upstairs tenant. She denied that she murdered the deceased, asserting that the couple had a good relationship stating that on the evening of 26/7/12 she and the deceased, in the company of PW1, PW2, one Ndirangu had travelled in the deceased's vehicle to attend church at Limuru and returned home at 11.00 p.m. That on arrival the entire party went to the couple's house for refreshments before parting ways.

9. That she had woken up at 7.00 a.m. on 27/7/12. As she left to collect milk from a milk dairy 1½ km away, her husband instructed her to leave the door open. Because of a long queue at the diary, she had returned home at 8.00 a.m. and met PW3, a tenant downstairs lighting a charcoal stove (*jiko*). Having exchanged greetings with PW3, she proceeded upstairs but was surprised to find a basin that should have been in her house, in the hallway. She had asked PW3 about it but got no information. On entering her house, she saw fresh blood stains on the floor of the sitting room and proceeding to the bedroom where saw a pool of blood. She screamed and called PW3 to accompany her to the bedroom. A curtain separated the kitchenette from the bedroom. PW3 drew the curtain, and when she called her husband he did not respond. That she passed out and was taken to the house of a neighbor.

10. It was her further evidence that that the compound in which she lived had neither a fence or gate and that the all the occupants of her building including herself and the tenants used the two external pit latrines erected in the compound. She denied that any of these were reserved for her and her husband or that she gave keys thereto to police on the material date and stated that neither of these had locks. Further, she stated that she was at the neighbour's when police demolished the latrines could not comment on the items recovered therefrom by police. She closed her testimony by stating that her husband's death was a mystery that she could not explain.

11. Parties subsequently filed their written submissions. The prosecution reiterated the three ingredients of the offence that must be proved in a murder charge. It was submitted that PW1, PW2, PW3 and PW4 all heard screams coming from the deceased 's house and upon going to check, found the deceased lying on the bed, soaked in blood. It was submitted that PW5 after conducting the autopsy formed the opinion that the cause of death was severe head injury secondary to blunt force trauma. The Prosecution counsel further submitted that her case was based on circumstantial evidence as there were no eye witnesses. It was submitted that the accused had was duty bound to explain how the deceased died or how she parted with the deceased.

12. The defence in final submissions, asserted that there are significant gaps in the prosecution's case. It was submitted that the deceased and the accused related well; that the pit latrines were never locked making it difficult to establish where the blood-stained items were from and that the compound was not fenced, hence could be accessed by anyone. It was further submitted that the Accused's DNA material was not traced on the recovered items. Lastly it was submitted that suspicion alone is not substitute for evidence and the circumstantial evidence herein does not point to the guilt of the Accused and as such the accused should be acquitted.

13. The court has considered the evidence tendered at the hearing and the respective submissions made by parties. There is no dispute that the Accused was cohabiting with the deceased at Gatimu village in the material period. The couple resided in a single storey building, occupying one flat upstairs while tenants, including PW2 and PW3 the former who also doubled up as caretakers resided in the three flats downstairs. One tenant referred to as Joseph occupied one flat upstairs. There is no dispute that a parent or parents of the deceased and their house-help PW1 resided in the same compound but in their own separate house, a few metres away, and that the homestead belonged to the deceased 's parents/family.

14. There is no dispute that the deceased, PW1, PW2 and one Ndirangu drove in the deceased's car on the evening of 26/7/12 to attend a service in a local church returning home about 10.30 p.m., that the party proceeded to the house of the deceased for some refreshments before parting to retire in their respective dwellings. It is undisputed that the Accused and deceased remained together in their house and that on the next morning, the Accused raised an alarm, and called PW3 to her house where the deceased was found dead in the bed, from obvious head injuries. That the deceased died a violent death arising from a stab wound on the head and multiple blunt force injuries which fractured his skull, injuring his brain, is undisputed. The sole issue for determination in this case is whether of malice aforethought, the Accused inflicted these injuries upon the deceased.

15. Regarding malice aforethought, a definition is found in Section 206 of the penal Code. The relevant portion of the section states that:

> **"Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances: -**
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> **a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;**
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> **b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be cause:**
>
> **c)…..**
>
> **d)…..."**

16. According to the pathologist, the deceased in this case had several external injuries, namely; a stab would on the head, bruise on the head and another bruise on left arm, described as a possible defence injury. Internally, the pathologist noted diffuse bleeding in the head and multiple skull fractures on the left side of the head and consistent *"multiple brain lacerations on the left cerebral hemisphere with intra-cerebral hemorrhage"*. His view was that the injuries were as a result of blunt and sharp trauma. Based on this injuries, and their location on the body it is apparent that the person who inflicted them on the deceased intended to cause death or grievous harm to the deceased. If

indeed the Accused is the person who inflicted these injuries her intention was to cause death or grievous harm.

17. The prosecution case is based on circumstantial evidence, principally , the fact that the Accused was the only person last seen in the company of the deceased in their house on the night of 26th July, 2012, her conduct on the morning of the discovery of the dead body in bed and the finding of blood-stained pillow cases and a t-shirt said to emanate from the couple's house, from a latrine which police believed to be exclusively used by the couple.

18. The principles applicable in dealing with a case where the prosecution case rests primarily on circumstantial evidence are settled. In Joan Chebichii Sawe -Vs- Republic (2003) e KLR the Court of Appeal restated the principles applicable in considering circumstantial evidence. The Court observed that:-

> **"In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. There must be no other co-existing circumstances weakening the claim of circumstances relied on. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution, and always remains with the prosecution. It is a burden, which never shifts to the party accused."**

19. This passage captures the principles pronounced in the timeless decisions on circumstantial evidence, namely Republic - vs Kipkering Arap Koske [1949]16 EACA 135 and Simoni Musoke -Vs- Uganda (1958) EA 715. In Musili Tulo -Vs- Republic [2014] eKLR the Court of Appeal reiterated the need to closely examine circumstantial evidence before making an inference of guilt, the object being to ascertain whether such evidence satisfies the principles in the case of Kipkering Arap Koske and in Musoke's case. In Tulo's case, the court restated the principles as follows:-

> **"i)?The circumstances from which an inference of guilt is sought to ?be drawn, must be cogently and firmly established;**
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> **ii)?Those circumstances should be of a definite tendency unerringly ?pointing towards the guilt of the accused;**
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> **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 no one else."**

20. The Court went on to state that:

> **"In order to ascertain whether or not the inculpatory facts put forward by the prosecution are incompatible with the innocence of the Accused and incapable of any other reasonable hypothesis than that of guilt, we must also consider a further principle set out in the case of Musoke -Vs- Republic [1958] EA 715 citing with approval Teper -Vs- Republic [1952] A.C. 480 thus:**
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> **"It is also necessary before drawing the inference of the Accused's guilty from circumstantial evidence to be sure that there are no other co-existing circumstances which weaken or destroy the inference."**

21. The Accused was admittedly left in the company of the deceased on the night of 26th and 27th July 2012 when their guests left, after 10.30 p.m. That was the last time the deceased was seen alive. The witnesses PW1, 2 and 3 confirmed that there no signs of strain or trouble in the couple's relationship up to that moment, but I think it is stretching things for the Accused to claim that in their cohabitation over 4 years she and the deceased had never disagreed. That would be abnormal.

22. Concerning the morning of 27/7/12, three witnesses (PW1, 2, & 3) assert that the Accused raised an alarm before 8.00 a.m. In particular, **PW3's** evidence stated that she had seen thee Accused return with milk at 6.30 a.m and that at 7.00 a.m. the Accused approached her. The witness stated that:

> **"I was making breakfast at around 7.00 a.m. I heard someone calling me. It was Wambui (Accused). She asked me who had come into the house. She said she found the basin and it was not there previously. She was upstairs. Then she called me to go inside. I thought her husband had collapsed since I knew he was diabetic.**
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> **The Accused opened the curtain and asked what I was seeing. I saw the deceased dead facing the opposite direction. As soon as I said what I saw the Accused started screaming……. People came in response to the screams. They came into the house. We took the Accused downstairs. The area chief came and then police came."**

23. During cross-examination, this witness said she had first seen the Accused return with milk at 6.30 a.m. although her written statement referred to 8.00 a.m. Equally, the statement asserted that the Accused had been screaming when she called the witness into her house. Despite these discrepancies, the basic evidence of the witness did not detract from the admitted fact that the Accused having gone out early in the morning, returned with milk before raising an alarm. It is conceded by the defence that on returning, the Accused first questioned the fact that a basin which she had left in the house was in the hallway not inside the house. That she did at that point speak to **PW3** asking her "who had moved the basin". Pausing there, it appears strange that having allegedly left the basin in her house and the deceased alive in the house, the Accused thought to seek answers from **PW3** who was downstairs, rather than the deceased who should have known better. The Accused was keen to mention to the court that the deceased was diabetic and had asked her to leave the door open as she went to shop. But based on the evidence that on the previous day the deceased had been active, driving his vehicle to and from church, it is even stranger that the Accused did not call out for and make these enquiries of the deceased in the first instance, rather than **PW3** who was downstairs.

24.Secondly, having left him in the house, well and awake, why would she overreact to the mere fact that a basin had been placed outside the house from her sitting room? According to **PW3**, even when the two later went together upstairs, the Accused asked **PW3** to enter, then opened the curtain and asked what she was seeing, before she started to scream, after **PW3** told her what she had seen. In her own words, the Accused only called out her husband after **PW3** had come with her and opened the curtain to reveal the dead body. That after she had seen blood stains on the floor of the sitting room and bedroom area, she had run out screaming and called **PW3,** not even her husband's name.

25. That PW3 and Accused were together in this discovery before a crowd came, suggests strongly that in fact the Accused did not scream in the first instance, but called PW3 and led her to the bedroom. Had the Accused first screamed, the other occupants of the building and homestead would have arrived in the deceased's house at roughly the same time as the PW3 and possibly made the discovery together with PW3 and the Accused. In her own account, the Accused indicates that the crowd only came after the discovery of the dead body, which is what PW3 also said. PW3 said she was too shocked to scream but that the Accused started to scream after the witness described what she had seen behind the curtain. PW1 said that she was attracted to the scene by screams by the Accused, that on arrival she saw the deceased lying in blood-soaked beddings but saw no blood on the floor.

26. **PW2** also arrived at the scene after **PW3.** He stated that the time was about 7.30 a.m. when he heard screaming as he returned from an errand and that when he got to the house of the couple, he found women restraining the Accused who was "*screaming in pain*" and asking who had "*done this*". He said that the deceased had had a phone in his hand. **PW4,** the area chief arrived at the scene, in his words, after 7.45 a.m., also attracted by screams. He got to the scene after **PW1 – PW3.** He testified that he found many people at the scene and that he too noted that the deceased had a phone in his hand and that he saw blood stains on the door of the house.

27. From all these accounts, it is evident that the events they describe occurred before 8.00 am – primarily the discovery of the body of the deceased in the bed in his house. Even assuming that the Accused was away for one hour from 7.00 am to 8.00am, her claim that the customers at the diary was so many that it took her a whole hour to get milk sounds contrived. Secondly, the fact that the dairy was 1 ½ kilometers away is intriguing. Lari area being a rural community, it is quite strange that one would have to travel 1 ½ kilometers, and wait almost an hour to buy milk for the consumption of just two people. **PW2** himself testified that on the material morning he had gotten up and left at 7.30 am, had fetched milk from a neighbour and was on his way back home when he heard the Accused's screams. Even if **PW3** confused the time of the Accused's return home, she stated that the accused "was coming from the shops… carrying milk".

28. The alleged long trip to the dairy and hour-long absence from the house by the Accused was not canvassed directly with any of the key witnesses, PW1 – 3 during cross- examination. For my part, looking at that account, it is difficult to believe this piece of evidence as a true explanation for the Accused's long absence. More so when taken in conjunction with the strange behavior of the Accused person upon arriving home, and the strange alleged request by the deceased for her to leave the door open as she left for the dairy. Surely, the deceased was not disabled and could open the door for himself. It seems that the purpose of this rather contrived story was to create the impression that the deceased was murdered that same morning while the Accused was away from home having gone out to buy milk.

29. Assuming so, the deceased was certainly awake, and the pathologist also noted a defence injury to his upper arm close to the elbow. Surely, there would have been a commotion, heard by neighbours in the morning, including **PW 3** if indeed a stranger or intruder had sneaked in to attack the deceased while the Accused was away. Surely the deceased would have raised an alarm and attracted other people within the compound. The discovery of items (2 pillowcases and t-shirt) all stained with blood, and gloves according to **PW1** and **PW4**, in the pit latrine on the compound, on the same morning, in my view tends to negate the suggestion of the offence having occurred in the one hour when the Accused was away from the house. It seems the compound had several people living there and the possibility that an intruder or third party could also, having committed the murder, been able to carry these items and throw them into the external communal toilet undetected, appears remote.

30. It appears more likely that these were dumped in the pit latrine in the night preceding or very early on the morning of 27th July 2017. Although the prosecution evidence that the Accused had a key to the latrine from which the items were recovered was rather shaky, **PW1's** identification of the items, and the fact that they were blood-stained, with one pillow case bearing blood stains matching the deceased's blood sample, is strong evidence that these items came from the house of the deceased. If, as the circumstantial evidence strongly suggests, these items were dumped in the pit latrine on the night of 26th or early in the next morning, then the deceased must have been murdered in the night, possibly whilst asleep. His injuries were concentrated on the left side of his head and limb and the beddings he lay on were soaked in blood.

31. The Accused was the person last seen in the company of the deceased while alive. Under section 111 of the Evidence Act, she is the person best placed to furnish an account in respect the events leading up to the morning of 27th July 2012. Section 111 in in the following terms:

> **"(1) When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him:**
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> **Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution, whether in cross-examination or otherwise, that such circumstances or facts exist: Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defense creates a reasonable doubt as to the guilt of the accused person in respect of that offence.**
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> **(2) Nothing in this section shall—**
>
> > **(a) prejudice or diminish in any respect the obligation to establish by evidence according to law any acts, omissions or intentions which are legally necessary to constitute the offence with which the person accused is charged; or**

(b) impose on the prosecution the burden of proving that the circumstances or facts described in subsection (1) of this section do not exist; or

(c) affect the burden placed upon an accused person to prove a defence of intoxication or insanity".

32. I have already indicated that the Accused's narrative that she was away for a full hour early on the morning of 27th July for the sole purpose of buying milk sounds unconvincing and contrived. Secondly, her conduct with **PW3** on arrival, taken together with that narrative suggests strongly that the Accused, by the time she purported to ask **PW3** to come up to her house was already aware the deceased had died. That is why she did not call out to him to inquire about the moved basin. That is why she made up a story of travelling 1½ kilometers to a dairy and spending one hour to buy milk which was readily available in the neighborhood. That is why she did not want to be alone to "*discover*" the dead body on return to the home, but called PW3 to make that "*discovery*". That is why in her evidence, she was reticent about the clothes recovered from the pit latrine, stating in her evidence- in -chief that she could not comment thereon, but on being pressed in cross examination stating she did not recognize the items.

1Lesiit J in **Republic v. Nicholas Ngugi Bangwa (2015) e KLR** relied on the Court of Appeal case of **Ernest Abang'a alias Onyango V Republic CA NO. 32 OF 1990**, where the Court had observed that:

"In RAFAERI MUNYA alias RAFAERI KIBUKA V REGINAM (1953) 20 EACA 226, the appellant there was convicted of murder and the case against him was mainly based on circumstantial evidence. In his sworn evidence at the trial, he made some denials which were obviously false. It was held that:

The force of suspicious circumstances is augmented where the person accused attempts no explanation of facts which he may reasonably be expected to be able and interested to explain; false, incredible or contradictory statements given by way of explanation, if disapproved or disbelieved become of substantive inculpatory effect" (emphasis added).

This case in our view, does not in any way go against the basic legal principle that the burden of proving a criminal charge beyond doubt is solely and squarely upon the prosecution. But its basic holding, namely that when an accused person tells an obvious and deliberate lie which is disproved or disbelieved, then such a lie is capable of providing corroboration to other independent available".

33. The accused's desperate attempt in this case to remove herself from the murder scene on morning of 27th July 2012 and her proven conduct after her return speaks volumes of what she knew. Her explanation is unbelievable. Whether or not the deceased's homestead had a fence or gate, there was no opportunity on the said morning for an intruder, to sneak in, murder the deceased, clean up by removing the blood-stained pillow cases and t-shirt and throwing these in a communal pit latrine and then leaving the compound unnoticed. The deceased was literally clobbered to death, and most likely in his sleep in his bed and had no fighting chance. The Accused's early departure and return home after an hour's absence on the material morning, and the false explanation therefor, was intended to give the impression that the deceased was murdered in the morning, which as I have indicated does not appear believable. That the Accused conjured a false narrative serves to augment the prosecution evidence against her.

34. There is no requirement that in a case of murder to prove motive but it is an important element in a case resting on circumstantial evidence – see **Libambula V Republic [2003] EA.** Whereas the prosecution witnesses were unaware of any existing dispute or bad blood without between the accused and deceased, it is quite unbelievable that the couple had never quarreled, in their 4 years of cohabitation, as the Accused asserted in her evidence. The Accused struck me by her own evidence and that of the prosecution as a facetious a person of guile, and methodical, quite able to put up appearances and orchestrate things to her desired objective. Hence the fact that she and the deceased did not appear to prosecution witnesses who saw them on the night of 26th to have problems between them, does not exclude the existence of such problems, more so as the deceased was said to have another wife living abroad.

35. Reviewing the entire evidence, the court accepts the prosecution case that the deceased was stabbed and clobbered to death on the night of 26th and 27th July, 2012 by the Accused who later dumped the bloodied items in the latrines in the compound and early on the next day, the Accused set about to orchestrate events to exonerate herself by absenting herself ostensibly on a milk- buying errand to cover up for the murder. This she did by deliberately leaving home early, leaving the door open and staying away long enough only to return and lure PW3 to come to her house so that she would to "*discover*" the body of the deceased in her house in the presence of a witness. The evidence on record does not allow any room for the involvement in the murder of an intruder in the morning, as the Accused purported in her defence. Her defence is a sham and does not stand up to scrutiny. I am satisfied that the prosecution has proved its case against the Accused person, beyond any reasonable doubt and will convict her as charged.

DELIVERED AND SIGNED AT KIAMBU THIS 6TH DAY OF FEBRUARY 2020

C. MEOLI

JUDGE

In the presence of:

Ms Clite holding brief for Mr. Wamwayi for Accused

Accused – Present