



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT SIAYA**

**CRIMINAL CASE NO. 11 OF 2017[MURDER]**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**PAUL BAKI GERO.....ACCUSED**

**JUDGEMENT**

1. The accused person herein, **Baki Gero Paul**, is charged with the offence of murder contrary to Section 203 as read with Section 204 of the **Penal Code**. Particulars of Information dated 20<sup>th</sup> June 2017 signed by Maurine Odumba Prosecution Counsel I on behalf of the Director of Public Prosecutions are that between the 3<sup>rd</sup> and 4<sup>th</sup> of July 2017, the accused murdered his wife **Jane Anyango Baki**. The accused pleaded not guilty to the charge.

2. The prosecution called six witnesses to establish a prima facie case against the accused person.

3. **PW1 James Migosi Gero** a farmer from Uyoma testified that between 3<sup>rd</sup> & 4<sup>th</sup> June 2017 at night, he was at his home with his two wives and that the deceased had been married to his brother Paul Baki Gero for more than twenty years and that they had four children, but one died.

4. He stated that before the material night, he had seen Jane Anyango when she went to see him and that she was alone, leaving behind her husband.

5. PW1 stated that he learned of the death of Jane when the accused person went and told PW1 of the demise of the deceased but that the witness did not ask the accused as to what had caused the death of the deceased so he proceeded to the home of the accused and found her body inside a store, lying in a pool of blood, with her face facing the wall while the legs were near the door.

6. On being cross examined by Mr Kowino Advocate for the accused person, PW1 stated that he could not tell if the deceased and the accused who was his brother had any domestic issues as he lived far from them and that he had told the police in his statement that he had never witnessed any physical fights between the two.

7. **PW2, Wilberforce O. Ochal** from East Uyoma, Rarieda Sub-county and a retired Chief testified and recalled that on 3<sup>rd</sup> and 4<sup>th</sup> June, 2017, he was in the office. That on 4/6/2017 at about 9.am he received a telephone call from Daniel Migosi who told him that Jane Anyango was dead. He then called the Officer Commanding Police Station of Aram Police Station as he proceeded to the scene of crime at the home of Paul Baki. On arrival he saw a body of the deceased Jane Anyango Baki lying on its back. It was in the kitchen and there were some cuts on the body and on both legs. He stated that he had known the deceased for about 30 years since she married the accused and that they had three children. He could not tell what may have killed the deceased.

8. In cross examination by Mr Kowino Advocate for the accused person, the witness stated that he had known both the accused and deceased for over 30 years in his capacity as the Area Chief.

9. **PW3, No. 232333 Chief Inspector of Police Abdirahim Abdullahi and the OCS Aram Police Station** testified and recalled that on 4/6/2017 at about 10.00 am he was on duty when he received a telephone call from the Chief East Uyoma location, Mr. Wilberforce Ochal who informed him that there was a murder report at Maramba village involving Paul Baki the accused who had murdered Jane Anyango Baki, his wife.

10. The witness booked the report in the Occurrence Book and organised for the scene to be visited. He, in the company of PC Pius Mulwa and other police officers visited the scene and upon arrival they found members of the public and family members of the deceased gathered. He entered the accused person's house of 2 rooms and a kitchen and found the deceased Jane Anyango dead, lying down in the kitchen. The body had multiple injuries on both legs and the ankle. There was blood all over the floor of the kitchen. The body had other injuries on the left hand.

11. The husband of the deceased, who is the accused herein, was in the bedroom and on his left hand were visible injuries. He therefore organized for the scene to be visited and photographed by the scenes of crime personnel, PC Wamalwa of Siaya. The accused was then arrested and taken to the Police Station and processed for murder. The witness identified the photographs which were marked as MFI (a)-(g). He stated that the investigations were taken over by CPC Chege of CID Rarieda Office.
12. On being cross examined by Mr. Kowino Advocate for the accused person, the witness stated that when the report of death was received, what was booked was a visit to the scene and returning to the police station from the scene. He reiterated that he found the accused had injuries on his left hand.
13. **PW4 Dr. Okun Benjamin Ochieng** carried out the post mortem on the deceased's body at Madiany District Hospital on 12/6/2017. The body was identified to the Doctor by James Migose Gero and Evans Karani escorted by CPL Karani. The deceased was said to be aged between 40-60 years, of good nutritional status, 5'6" height. On examination, externally, the body had a blunt head injury at the back 4cm by 1cm in size each a cut on left ear and bleeding, mild cyanosis on mucus membrane, linear cut on the lateral aspect of left leg measuring 5 cm length, 3 cuts on medial aspect of right leg penetrating 3cm deep bleeding and clots were seen at the area. Internally, all systems were normal.
14. On the inside of the skull, there was bleeding on the inside due to blunt injuries on the head. In the nervous system - right side of brain was swollen and there was bleeding. The spinal column and spinal cord were normal.
15. In the Doctor's opinion, the cause of death was due to haemorrhagic shock due to multiple cuts with blunt head injury. The Doctor issued a Death Certificate No.1113145 and signed the post-mortem form which he produced in court as PEX No.1.
16. **PW5 Daniel Ouma Migose a resident of Ragegni sub-location, East Uyoma, Rarieda sub-county and the Administrator/ Assistant County Commissioner, Kisii County,** testified on oath and stated that on 4/6/2017 at about 8.00 am, he was at his rural home Maramba village with his family members including James Migose and Pauline Atieno, their sister. That at about 9am while he was at his brother's home and while seated outside the house of James Gero Migose discussing the burial of his late wife Veronica Atieno Migose who had been buried, he saw his Uncle Paul Baki passing outside 50 metres away going towards PW5's father's home. The witness then saw Paul and PW5's brother James and some people emerging from his father's home wailing saying Nyakano who was Paul Baki's wife was dead. He stated that Paul is a brother to his (PW5's) father. The witness proceeded to the home of Paul Baki and found his door open and people were getting in and out. When he entered the store, he saw 'Nyakano' lying in a pool of blood, while Paul Baki was seated in the bedroom, looking downwards and PW5's father told PW5 that Paul was cut on the hand. PW5 then entered the house and checked on Paul and saw 2 cuts on his left arm. He called the OCS and the OCPD Rarieda. He called Wilberforce Ochar the Assistant Chief of Ragegni Sublocation and told him of the death. He then stayed at the home to secure the scene of crime. Later the Assistant Chief arrived and together they controlled the scene until the police arrived and took the deceased's body to the mortuary. He identified the accused in the dock as Paul Baki.
17. In cross examination by Mr Kowino Advocate for the accused person, the witness reiterated that he confirmed that Paul had cut wounds on the left arm which were fresh and bleeding.
18. **PW7 No. 67008 CPL Christopher Chege** from DCI Rarieda sub-county investigated this case. He recalled that on 4/6/2017 while in the office, he was instructed by the DCIO to investigate the murder reported in the station. With other police officers, they visited the scene at around 10.47 am and established that the OCS had earlier visited the scene. They established that the deceased Jane Anyango Baki had been living with her husband Paul Baki Gero, and they were only two of them in their house and residence in Maramba village, East Uyoma.
19. That on entering the house, they found the deceased in the kitchen which was also used as a store. She had multiple injuries. The accused was seated in his bedroom.
20. That upon interrogation he told the police officers that they (accused and his wife) were attacked at 9pm the previous night by two thugs. He said that they had not closed the door so the thugs gained entry and that the accused told them that he never raised any alarm. That the accused further told them that the attackers attacked him and proceeded to attack his wife and cut her and that when he checked on her, she was wailing then he went to sleep leaving her in the sitting room. That he only realized the following day that his wife was dead and that he reported the matter to his brother at 9.00 am the following morning and his brother went to confirm and members of the public assembled at the scene.
21. At the scene, the investigating officer recovered a panga which was beside the deceased where she lay, and it had blood stains. He produced the long panga tied with clothing at the handle as PEX2. The witness also recovered a white blood stained table cloth in the sitting room, which he produced as PEX 3.
22. He further stated that on 7/6/2017, he revisited the scene of murder and he recovered **a blood stained light green trouser from under the bed of the accused which was inside a washing basin.** He produced the same as PEX 4.
23. The Officer also recovered a blood stained long sleeved brown shirt from the deceased's house and that the suspect said that he was wearing the shirt at the material time. He produced it as Pex 5.
24. The witness also prepared a memo and send the exhibits to the Government Chemist in Kisumu. The exhibit memo contained a blood stained shirt, trouser, panga, table cloth, blood samples of the deceased and blood samples of the suspect and blood scrubbed from the wall of the house. He then received a report dated 21/12/2017 of an analysis done by R.K. Langat, Government Analyst. He produced the same with no objection from counsel for the accused person, Exhibit memo and Report as PEX 6(a) and 6(b) respectively.
25. The witness also identified the accused in the dock as the suspect he interrogated with regard to the alleged murder of the deceased.

26. He stated that the Government Analyst found that the DNA profiles generated by the blood stains from the trouser, the table cloth and the sand matched the DNA profile of Paul Baki Gero who is the accused herein whereas the DNA profiles generated by the blood stains from the shirt and the panga was a mixed DNA profiles of Paul Baki Gero and Jane Anyango Baki (deceased).

27. On being cross examined by Mr. Kowino Counsel for the accused person, the witness stated that when he visited the scene, he saw the accused and also saw visible injuries on his body in the nature of fresh cut wounds and that accused stated that they had been attacked the previous night by thugs.

28. He stated that he did not dust the panga for finger print impressions and that none of the witnesses gave him the impression that the accused and the deceased had any disagreements.

29. The prosecution closed its case and on being placed on his defence, the accused person gave sworn testimony and sated that on the night of 3<sup>rd</sup> July 2017 at around 9.00 pm, some thugs broke into their house whilst armed with a panga and a wooden plank. That the thugs cut him on the hand when he resisted and subsequently hit him on the back with a wooden plank causing him to lose consciousness until 6.00 am. That he later found his wife lying down in the pool of blood already dead upon which he went and notified his elder brother, PW1. The accused further testified that he lived peacefully with his wife and could not harm her.

## **SUBMISSIONS**

30. In the written submissions filed by counsel for the accused person, Mr. Kowino submitted that the prosecution had failed to prove that the accused caused the injury to the deceased which injury resulted to the deceased's death and or that the accused at the time had formed the necessary motive to cause death or grievous harm to the deceased.

31. It was submitted that there was no eye witness to the alleged offence and thus the prosecution's case solely rested on circumstantial evidence but did not satisfy the requirements set forth in the case of **Sawe v Rep (2003) KLR** and **Abanga Alias Onyango v Rep CR.A NO.32 OF 1990 (UR)** in which the court set forth the principles the court should rely on when considering circumstantial evidence.

32. It was further submitted that there was no evidence of malice aforethought established by the prosecution to sustain the charge brought against the accused. Mr. Kowinho further submitted that the circumstantial evidence on record confirmed that the accused person had injuries and was bleeding clearly confirming that the accused was also injured during the incident. It was also submitted that the police never dusted the recovered panga for finger print impressions to connect the accused with the use of the panga.

33. Finally, counsel submitted that the only clear testimony on the circumstances which occurred on the fateful night was the testimony of the accused, that they were attacked by thugs at night who inflicted the injuries on him and the deceased, a testimony which was unchallenged during cross examination.

## **DETERMINATION**

34. I have carefully considered the evidence adduced by the prosecution witnesses and the accused person in his sworn defence and all the exhibits produced in evidence. I have also considered the submissions by the defence counsel.

35. For the Prosecution to secure a conviction on the charge of murder, it has to prove three ingredients against an Accused person. In **Anthony Ndegwa Ngari v Republic [2014] eKLR**, the elements of the offence of murder were listed as:

- a) ***the death of the deceased occurred;***
- b) ***that the accused committed the unlawful act which caused the death of the deceased; and***
- c) ***that the accused had malice aforethought.***

36. The offence of murder is committed when any person who of malice aforethought causes death of another person by an unlawful act or omission as provided under Section 203 of the Penal Code.

37. Malice aforethought is defined under Section 206 of the Penal Code as:

***“Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances -***

***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;***

***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 caused;***

***c. an intent to commit a felony;***

***d. an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or***

*attempted to commit a felony.”*

38. In determining whether the prosecution evidence as adduced meets the threshold of proving its case beyond reasonable doubt, I must examine the evidence as adduced. There is no dispute that there was no eye witness to the incident that led to the death of the deceased and neither is there direct evidence linking the accused person with the murder of the deceased. What that means is that this court must rely on the circumstantial evidence adduced. Evidence of surrounding circumstances to a crime is said to be the best evidence. Courts in this country have taken cognizance of this fact in various decisions. In **Neema Mwandoro Ndurya v. R [2008] eKLR**, the Court of Appeal cited with approval the case of **R v Taylor Weaver and Donovan (1928) 21 Cr. App. R 20** where the court stated that:

*“Circumstantial evidence is often said to be the best evidence. It is the evidence of surrounding circumstances which by intensified examination is capable of proving a proposition with accuracy of mathematics.”*

39. However, caution is called for when relying on circumstantial evidence. While recognizing the dangers in relying on circumstantial evidence without exercising this caution, the Court in **Teper v. R [1952] AC at p. 489** stated:

*“Circumstantial evidence must always be narrowly examined, if only because evidence of this kind may be fabricated to cast suspicion on another. It is also necessary before drawing the inference of accused’s guilt from circumstantial evidence to be sure that there are no co-existing circumstances which could weaken or destroy the inference.”*

40. On whether there was proof of death, the facts in this case are clear that the deceased died on the night of 3<sup>rd</sup> and 4<sup>th</sup> July 2017. Thus there is no doubt of the deceased’s death, and the same is corroborated by the post-mortem report produced by PW4 that concluded that the deceased cause of death was due to hemorrhagic shock due to multiple cuts with blunt head injury.

41. However, none of the prosecution witnesses saw the deceased being killed. PW2 testified that he only became aware of the deceased’s death on the 4<sup>th</sup> July 2017 after receiving a call from one Daniel Migosi. PW3 testified that he found the body of the deceased had multiple injuries on both legs and the ankle and that there was blood all over the floor of the kitchen.

42. PW6 the investigating officer testified that he recovered a panga, a white blood stained table cloth, a blood stained trouser and a long sleeved brown shirt stained with blood from the house of the accused which he forwarded to the Government Analyst who found that the DNA profiles generated by the blood stains on the recovered items above all matched the DNA profile of the accused and the deceased. However, in cross examination, PW6 testified that he did not dust the panga for finger print impressions and that none of the witnesses gave him the impression that the accused and the deceased had any disagreements. He however stated in his evidence in chief that on 4/2017 he revisited the scene of alleged murder and recovered a trouser from the house of the accused which trouser was soaked in a basin and kept under his bed. DNA evidence revealed that the blood on the trouser was the accused person’s own blood.

43. The question is whether this evidence is sufficient proof beyond reasonable doubt that death of the deceased was caused by the unlawful act or omission of the accused.

44. The accused’s defence was that him and the deceased were in their house when they were attacked by thugs who invaded them at about 9pm on the night of 3<sup>rd</sup> July 2017, and that in the course he lost consciousness only to wake up at 6am the following day to find his wife dead so he went to inform his brother, PW1.

45. PW1 testified that he was not aware of any dispute or conflict between the accused and the deceased. PW1, PW2, PW3, PW5 and PW6 all noted that the accused had cuts on his hands consistent with his assertion that he was cut by the thugs who attacked them. In my considered opinion the defence by the accused holds weight. It explains the blood stains found by PW6 and forwarded to the Government Analyst as per the DNA profiles generated that indeed the blood on his body and clothing belonged to him.

46. Therefore, assuming the accused person was the one who cut the deceased with the panga, the question is, why the blood of the deceased not sprinkled on the accused? Instead, the panga had blood stains which generated a mixed DNA profiles of the accused and the deceased, an indication that the same panga was used to cut the accused and the deceased.

47. The other question is whether the accused could have cut the deceased using the panga then he turned it on himself and cut his left hand. That is a possibility and a rebuttable presumption, in the circumstances of this case. However, if the prosecution wanted this court to believe that theory, they should have advanced it with evidence. There was no swab taken of the panga handle to compare with the finger prints of the accused or his DNA profile to show that the panga was handled by the accused person and no other person.

48. Albeit the investigating officer testified that on 7/6/2017, he revisited the scene of murder and he recovered PEX 4, **a blood stained** light green trouser from **under the bed of the accused which was inside a washing basin**, and PEX 5, a blood stained long sleeved brown shirt from the deceased’s house and that the suspect said that he was wearing the shirt at the material time, the evidence from the Government analyst was clear that the trouser and shirt recovered from the accused had blood stains that matched the DNA profile of the accused whereas the shirt and panga had blood stains that matched mixed DNA profiles of the accused and the deceased. There was no evidence to show that the blood stains found on the light green trouser which was recovered soaked in a basin and placed under the accused person’s bed was blood of the deceased.

49. It was therefore upon the prosecution to explain how the accused and the deceased’s blood and DNA profiles got mixed up since the accused was categorical and there was no contrary evidence that the panga which was recovered and which had mixed DNA profile of him and his deceased wife was not his as he had lost his panga about two months earlier.

50. Further, the accused person was consistent from the time of his interrogation by the police upon arrest and in his defence in court that he

and his wife were attacked that night and that he was cut on the hand and hit on the backside, that he lost consciousness and on regaining the same, he found his wife dead so he walked slowly to notify his brother, PW1 of what had happened. This court did observe the injuries that the accused had on his left hand which were healing. The prosecution did not explain how the accused person sustained those injuries.

51. The accused also testified and there was no contrary evidence that he loved his wife of 40 years and that they had no domestic disagreements at the material time. Furthermore, no witness testified that the accused and his wife had any issues to square which could have motivated the accused to violently attack his wife. The accused also denied suffering from any mental illness. The investigators did not pursue the line suggested by the accused during his interrogation that he and his wife were attacked by thugs who inflicted injuries on him and his wife, to rule out that possibility.

52. In the absence of any other evidence to dislodge this defence by the accused person, I find and hold that the prosecution has not proved beyond reasonable doubt that the accused and not any other person attacked and inflicted fatal injuries on the accused person's wife, the deceased.

53. The next issue is whether there was malice afterthought. The prosecution has a duty to prove malice aforethought on any of the circumstances stated under section 206 of the Penal Code. Malice aforethought can either be direct or indirect depending on the facts of each case at the trial. In **Republic v Tubere S/O Ochen [1945] 12 EACA 63** the court held that:

***“An inference of malice aforethought can be established by considering the nature of the weapon used, the part of the body targeted, the manner in which the weapon was used and the conduct of the accused before, during and after the attack”.***

54. It is the duty of the prosecution to prove the accused's guilt beyond any reasonable doubt PW1, PW2, PW3 and the investigating officer, PW6 all testified that there was no bad blood between the deceased and the accused. In the instant case, iam unable to find that the prosecution has proved malice aforethought on the part of the accused person.

55. Accordingly, I find the accused person herein **Paul Baki Gero** **NOT GUILTY** of the offence of murder and he is hereby acquitted of the offence of Murder and discharged from the Information for Murder dated 20<sup>th</sup> June, 2017.

56. Accordingly unless otherwise lawfully held, the accused person **Paul Baki Gero** is hereby set at liberty. And the surety is discharged. Security if any was deposited in court to be released to the surety forthwith.

Orders accordingly.

**Dated, Signed and Delivered at Siaya this 7<sup>th</sup> Day of May 2020 via Skype due to Covid 19 situation.**

**R.E. ABURILI**

**JUDGE**