



**REPUBLIC OF KENYA**

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

**CRIMINAL CASE NO. 28 OF 2011**

**REPUBLIC**

**VERSUS**

**CHARLES NGUNJIRI NJERI.....ACCUSED**

**JUDGMENT**

Gladys Njeri Ngunjiri lived in Gachuiro village, in the then Mathira West District of Central Province. She was in the habit of wailing and generally making noise in the night in her house without any particular reason to the extent that her neighbours somehow were used to it. On the night of 11 September 2011, she was heard shouting that her son, “charo” was killing her. This time round some neighbours responded and ventured out, probably to assist her if she was in any imminent danger. They went to her home but couldn’t enter the house because it was locked from inside. They retired back to their houses since, in any event, Gladys had gone quiet.

What they thought was normal turned out to be a tragedy because on the following morning, Gladys’s lifeless body was found in her house with her throat slit open. Perhaps, because she had shouted her son’s name the previous night as the person killing her, he was suspected of the murder. It is against this background that on 23 September 2011 the accused, who is the deceased’s only son, was arraigned and charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code, cap. 63, Laws of Kenya. The particulars offence were stated to be that on the night of 11<sup>th</sup> and 12<sup>th</sup> days of September, 2011 at Gachuiro village in Mathira West District within central province, the accused murdered Gladys Njeri Ngunjiri.

After he had been certified to be mentally fit to plead and stand trial the accused pleaded not guilty to the charge and so it befell upon the state to prove its case against him; to this end, it marshalled twelve witnesses.

The first of these witnesses was Irene Nyaguthi Thuita (PW1), the assistant chief of the area where the deceased hailed from. It was her evidence that on 12 December 2011, she was called on phone by Nyaga Kamau (PW2) whom she described as a village elder; he informed her that his neighbour, the deceased, had not woken up and her house was locked from inside. She advised him to break into the house. He apparently did and together with other neighbours they found the deceased dead. She then called the officer in charge of the nearest police station to inform him. This officer told her to tell the people at the scene to get a letter from the police station to enable them take the body to the mortuary. At the station, they were asked to go with the deceased’s treatment cards because she had been known to suffer from epilepsy. They got the cards which the deceased’s mother took to the police station. They later realised that the deceased may not have died of a natural cause but had, instead, been murdered. They reached this conclusion because there was a deep cut wound on the deceased’s right side of the neck.

The police took up the matter and transferred the body to the mortuary.

Mwangi Kamau(PW2), the village elder that the assistant chief (PW1) referred to in her testimony testified that he was the deceased’s neighbour as well and that on the night of 11 September 2011, at about 9.00 PM he heard the deceased scream from her house saying; “Nyaga charo is killing me when you are here”. He knew Charo to be the accused. He went to scene and found Milka Wangechi Wachira and Mwangi Wachira. One Ken (PW3) also joined them; he suggested that because of the deceased’s underlying medical condition, she may have been under an epileptic seizure. According to him, the deceased was not mentally stable and was capable of saying anything including making such utterances as “Mwangi Kamau is killing me”. Perhaps, because of this reason, they all returned to their houses thinking that the deceased had slept.

Nonetheless, he called Ken (PW3) the following day and, together, they proceeded to the deceased’s house. They knocked at her door but she did not respond. Anxious of what may probably have happened, he called and informed the assistant chief of the situation at the deceased’s house. The latter told him to break the door. They did as advised and, to their surprise, they found the deceased lying dead, with her back on the floor.

In the course of time, they were authorised by the police to take the body to the mortuary but as they removed the body from the house, they discovered that the deceased had a cut wound on the neck. He informed the assistant chief that the deceased had been murdered. It was his evidence that there was a knife inside the deceased’s body but that there was no blood on it. The knife was taken by the police.

Kenneth Maina Mwangi (PW3) testified that he was in his house on 11 September 2011 at 10.00 PM when Milkah Wangeci, a neighbour, came and told her that the deceased was shouting for help. They both went to the deceased's house and when he asked the deceased what the problem was she was only saying, "My son Charles, my son Charles. My son Charles is killing me." After the attempts gain entry into her house failed, they returned to their homes. Like the village elder (PW2), he testified that the deceased was in the habit of shouting unnecessarily. As a matter of fact, he testified that the deceased would go insane at times.

On the morning of 12 September 2011, he, together with Nyaga (PW2) went to the deceased's home. They called her out but she did not respond. It is then that the assistant chief(PW1) asked them to enter the house forcefully. They found the deceased dead. He described the bedroom where the deceased's body was found as dark and had to use a torch to see it. Apart from the bedroom, there were two other rooms in that house.

Simon Kamotho Muriuki (PW4) testified that he lived at Karatina and that on 11 September 2011 at about 6 PM he saw the accused at, a shopping centre at Itiati village where he had gone to collect his phone. He got to chat with him because he knew him and he was a student at school in which he chaired.

On 12 September 2011 the chief informed him that the deceased had been murdered. Together with the chief, they proceeded to the scene. He entered the house and found the deceased's body on the floor. Like the other witnesses who had been there earlier, he observed that the deceased had sustained a deep cut wound on the neck. They picked a knife which, according to his evidence, was stuck in a wall, in the bedroom. The body was in the sitting room but she had been murdered in a different room.

Rose Wanjiru Muthaiga(PW5) testified that he lived at Gachuiro village, the same place where the deceased lived but that she was a businesswoman in Karatina town. On 11 September, 2011 at about 7 PM she boarded a vehicle at a bus stage on her way home; before the vehicle left, the accused came and boarded the same vehicle. She even sent him to buy her eggs before their departure. She disembarked when she reached her home leaving the accused in the vehicle. She knew the accused because their homes are about half a kilometre apart and her son and the accused were age mates and friends; they used to visit each other. She learnt of the deceased's death on the following day.

Francis Kamau (PW6) testified that he was one of the people who went to the police station to report the death of the deceased; they were initially under the impression that the at the deceased had died a natural death and wanted authority to take the body to the mortuary, as a matter of course. But as they took the body, they discovered that it had a cut wound on the neck. With this discovery, they went back to the station and reported having seen a visible injury on the deceased's body. It is then that the police came and took the body to the mortuary. As far as the evidence of the knife is concerned, he testified that he saw it on the floor; it was blood-stained and close to the deceased's body. The police took it away.

Chief Inspector of police Helen Kitavi (PW7) investigated the complaint against the accused together with her colleague constable Zakayo Anjachi (PW11). At the time of the murder incident she was the acting officer in charge of Kiamachibi police station where the report of the murder was made. It was her testimony that the report was made on 12 September 2011. She visited the scene of murder together with constable Anjachi (PW11). They found the deceased's body on the floor in the bedroom. She observed that it had a cut wound on the throat. There was a blood-stained knife near the body. They took the body to Karatina hospital mortuary where the post-mortem was conducted. After this she went back to the scene to gather evidence. She established from the deceased's neighbours that the deceased lived alone and that on the previous night she had been shouting saying that her son was killing her. Her only son was the accused who was then schooling at Karatina where he had rented a house. Inspector Kitavi proceeded to the school but was told that the accused had not reported since the new term commenced. The officer informed the police at Ihwagi police post to assist her arrest the accused. They indeed arrested him. The accused led them to his house where they recovered a trouser and t-shirt that were blood stained. She forwarded these clothes together with the knife to the Government chemist for analysis. They also took a blood sample from the deceased and forwarded it to the Government chemist for the same purpose. Since the accused had a wound on his right hand, she took him to hospital for treatment. He told the officer that he sustained it as he struggled to cut his mother.

The officer described the deceased's house as isolated but she had neighbours whose homes were approximately 50 metres from the deceased's house. From the look of the house, it appeared that there was some commotion and, in her own words, there was blood all over. The deceased's head was almost severed from the rest of the body. She also established in her investigations that the accused and the deceased never lived in harmony.

Constable Anjachi (PW11) confirmed in his evidence that on 12 September 2011 at about 11.20 AM one Beth Wangui made a report at Kiamachibi police station of a natural death; she stated that her daughter, the deceased, had died in her house. She requested for authorisation from the police to take the body to the mortuary. She came back after about two hours and reported that while they were in the process of removing the body from the house, they discovered a severe injury on the deceased's neck. It is then that he, together with inspector Kitavi(PW6), proceeded to the scene. From their investigations, they established that the deceased had been screaming the previous night alleging that the accused was killing her. They learnt that the accused was a student at Ihwagi secondary school. With these leads, they proceeded to the school where they were informed that the accused had not reported back to school since the new term commenced. They then proceeded to Ihwagi police station and asked the officers at the station to trace the accused who lived nearby at Ihwagi trading centre. The accused was arrested almost immediately on 13 September 2011. The officers noted that he had fresh injuries on his hand. They accompanied him to his house where they recovered a greyish trouser and a white stripped t-shirt; both were wet and blood stained. The officer prepared an exhibit memo and forwarded the clothes together with the deceased's blood sample to the Government chemist for analysis. The officer also accompanied the deceased's relatives to the mortuary on 19 September 2011 for post-mortem purposes.

The accused was treated of his wounds by Maina Ndirangu (PW8) who testified that he was a clinical officer in the employment of the Government and, in that capacity, he examined the accused on 14 September 2011. He came to hospital with a history of self-inflicted wounds on his right hand. He established that the accused had a shallow cut-wound on the right pointing finger. There was another wound on the last finger. Both wounds measured approximately 1 by 2 centimetres. They were approximately three days old but were healing. They were caused by a sharp object. The officer produced the police medical form (P3) which he had duly filled.

Dr Stephen Wangómbe (PW9) produced the post-mortem report in the post-mortem conducted on the deceased's body. According to that report the post-mortem was conducted on 19 September 2011. The body was of an African female. It was observed that the head had almost been severed from the rest of the body. It was opined that the death was caused by severe loss of blood as a result of this severe injury. The pathologist also confirmed that the deceased's blood sample was taken for analysis.

The Government analyst was Lawrence Kinyua Muthuri (PW10). He testified that he received several items from constable Anjachi (PW11) on 2 October 2011. These items were the deceased's blood sample; a knife with a metal handle; a white polo t-shirt; and, a greyish trouser. He was tasked to examine the presence and source of any blood stains. It was his observation that the last three items were stained with blood. After a DNA profiling of the deceased's blood sample and the blood stains, he came to the conclusion that the DNA profile from the blood stains matched the DNA profile generated from the deceased's blood. Although the DNA profile of the accused's blood was never done, the analyst testified that each human being has a distinct DNA profile and except for twins no two persons can have a similar DNA profile.

Senior Superintendent of Police George Mutonya (PW12) testified that he was a chief inspector of police in 2011 at Karatina. His testimony was that on 19 September 2011, he was requested by inspector Kitavi to take a confession statement from the accused. The accused was then presented to him in his office. He asked the accused whether he wished any other person to be present while the confession was taken. The accused picked on his maternal uncle, Geoffrey Ndonga Ngunjiri. The latter was brought to his office. The officer then introduced himself to the suspect and told him the charges he faced. He was cautioned that whatever he said would be used in evidence. The accused said that he would give the statement voluntarily. He chose to give the statement in English. He read through it after it had been written and signed it. The officer countersigned it.

In the statement, the accused acknowledged that the deceased was his mother and that he was the only child of the deceased. He said the relationship between him and his mother had not been good for some time prior to her death. The deceased had been telling his grandmother that the accused was not disciplined and was not serious with his studies. He accused his mother of being irresponsible and not taking care of him and that he depended upon his grandmother for upkeep. In June 2011, his differences with the deceased boiled to such an extent that he was forced to leave and rent a house of his own at Ihwagi trading centre. In July 2011, he asked the deceased to give him his birth certificate for registration of examinations. Rather than give him the certificate, the deceased insulted him and accused him of looking for the certificate to secure gainful employment instead of concentrating on his studies. He chased the deceased around but his grandmother intervened and reconciled them. In September 2011 when the schools opened, apparently for the final term of the year, the deceased gave him Kshs. 1500/= for fees. However, he lost the money and when the deceased learnt of it she told him that from then henceforth he would have to take care of himself.

On the fateful day, the deceased asked him to leave as she did not want to see him again. He left for Karatina but he came back home at 7.30 PM. He did not find the deceased. She came back at around 10 PM and found him at home. She started making noise at the deceased and wished him death. It is then that the accused got annoyed and started hitting her. The deceased picked a knife to defend herself but the accused overpowered her, took the knife and cut her throat. She screamed, shouting that she was being killed by her son; neighbours were attracted to the scene. When he realised that he had killed her he escaped to Ihwagi. He was subsequently arrested by the police on 13 September 2011. The accused stated further that he had no intention of killing his mother but that he acted out of anger; he was remorseful for his actions.

But when he was finally put to his defence, the accused testified on oath and denied killing his mother. Instead, he said that he was at Ihwagi trading centre, at his rented house on 11<sup>th</sup> or 12<sup>th</sup> September 2011. He denied meeting his mother on either of those dates. He learnt of his mother's death on 12 September 2011 by which date he had not reported back to school because of lack of fees. On that day, he received a call request from his grandmother; when he called her back, she asked him where he was and he answered that he was at Ihwagi. After about half an hour she came accompanied by police officers and his uncle Geoffrey Ndonga. His uncle told him that he had murdered his mother. Together they went to his house and carried his clothes. He was subsequently charged with the offence of murder.

In answer to questions put to him during cross-examination, the accused denied knowing Wanjiru (PW5) or having travelled together in the same vehicle. He also denied having sustained any injuries on any of his hands. As far as the confession is concerned, the accused denied having recorded any confession or statement. Nonetheless, he testified that his uncle asked him to admit that he had killed his mother. He also insisted that he had a cordial relationship with his mother.

He admitted that Charo was his nickname but denied that his mother screamed on the fateful night calling out his name.

And that was all there was to evidence.

The evidence against the accused, as far as I understand the prosecution case is two-pronged; it is both circumstantial and confessional.

On the circumstantial front, the DNA analysis of the deceased's blood has created what, in my humble view, a formidable link between the accused and his mother's death.

The lead investigation officer, Chief Inspector Helen Kitavi (PW7) and her colleague, police constable Zakayo Anjachi (PW11), made reference to two aspects of the investigations that laid a sound basis for circumstantial evidence; these are the wounds on the accused's hand and the DNA profile generated from the deceased's blood and the blood stains on the accused's clothes.

Both officers testified of a fresh cut wound on the accused's right hand. According to inspector Kitavi, the accused was candid that he sustained this injury as he struggled to cut his mother. The fact of the injury was proved by the evidence of the medical officer, Ndirangu (PW8) who testified that he examined the accused on 14 September 2011 and established that he had a history a self-inflicted injury on his right hand; in particular, on the right palm and on the last finger, both measuring 1 by 2 centimetres. The injuries, according to his evidence, were healing and were approximately three days old. The evidence of the injuries was not controverted and answered, satisfactorily, the accused's denial that he had any injury on his hand.

As will be noted in due course, the accused himself alluded to the struggle between him and his mother over a knife that may well have turned out to be the killer weapon on the night of 11 September 2011; this was the same or the approximate date that the clinical officer estimated the injuries to have been inflicted. It therefore stands to logic that if that is the same date that the deceased was murdered, then she must have been the 'looser' in the struggle with her son; this would in turn imply that nobody else could possibly have murdered her if not the accused.

A more concrete piece of circumstantial evidence is the DNA analysis of the stains of blood that were found on the accused's apparel. According to inspector Kitavi (PW8) blood was splattered 'all over' in the deceased's bedroom; she attributed this to a possible struggle between the deceased and her assailant.

In the course of their investigations, inspector Kitavi and constable Anjachi (PW 11) recovered blood stained clothes from the accused's house. They suspected, and reasonably so, that the blood may be linked to the deceased's murder. According to constable Anjachi, he forwarded these items, amongst others, for chemical analysis at the Government laboratory. To be precise, he forwarded the deceased's blood sample, a kitchen knife, the accused's long trouser and t-shirt which are the clothes that were stained with blood. The government analyst (PW10) confirmed that he received these items at the Government laboratory on 2 October 2011 and that his task was to determine the presence and source of the blood stains. He came to the conclusion that the DNA sample generated from the kitchen knife, the accused t-shirt and trouser matched the DNA sample generated from the deceased's blood.

Without any explanation of how the deceased's blood came to be found on the accused's clothes, the irresistible conclusion one can make out of these facts is that the accused could only have come into contact with the deceased's blood when her throat was slit open, on the night she was murdered. No doubt, droplets of her gushing blood must have found their way to the accused's clothes. The evidence of the government analyst not only placed the accused at the scene of crime thereby discounting his alibi but it also points to him as the deceased's murderer.

Still on this aspect of circumstantial evidence, there was evidence, and the accused admitted as much, that he lived separately from his mother. However, on the night that his mother was murdered, Rose Muthaiga (PW5) travelled in the same vehicle that accused travelled from Karatina to her village which is the same village that the deceased lived. Although the accused denied ever seeing her, she remembered quite vividly that she not only saw the accused but she even sent him to buy her eggs before the vehicle in which they were travelling departed from Karatina. She disembarked when she reached her home leaving the accused in the vehicle because their home, where the deceased lived, was apparently further ahead. In the absence of any contrary evidence, Muthaiga's evidence suggests that the accused could not have been going anywhere else other than her mother's home.

That circumstantial evidence can found a conviction is not in doubt; it has been held in **Tumuheire versus Uganda (1967) E.A** at pages 328 and 331 that:

***"It should be observed that there is nothing derogatory in referring to evidence against an accused as circumstantial. Indeed, circumstantial evidence in a criminal case is often the best evidence in establishing the commission of a crime by a person as in the present case."***

As to how this evidence should be examined, the court said:

***"As was said by Lord Normand in Teper versus R (1952) A.C. at page 489:***

***'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 the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference.'***

***In R versus Taylor, Weaver and Donovan (1928), 21 Cr. App. Reports at page 20) the principle as regards the application of circumstantial evidence was enunciated in these words:***

***Circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensified examination, is capable of proving a proposition with the accuracy of mathematics. It is no derogation of evidence to say that it is circumstantial.'***

One aspect of 'examining the evidence narrowly' is being cautious that the evidence is inconsistent with the accused's innocence or, put differently, it is consistent with the accused's guilt.

It may also be that the circumstances proved are capable of either of the two results: they are consistent with the innocence of the accused or, on the other hand, they are consistent with his guilt. In that event, the accused is entitled to the benefit of doubt. (See **Sarkar on Evidence, 12<sup>th</sup> Edition, Page 34**).

But the rule always is, in order to justify an inference of guilt the incriminating facts must be incompatible with the innocence of the accused or the guilt of any person and incapable of explanation upon any other reasonable hypothesis than that of his guilt. Secondly, the circumstances from which an inference adverse to the accused is sought to be drawn must be proved beyond reasonable doubt and must be closely connected with the fact sought to be inferred. By way of analysis, the evidence has to satisfy the following criteria:

- a. the circumstances from which the conclusion is drawn should be fully established;

- b. all the facts should be consistent with the hypothesis;
  
- c. the circumstances should be of a conclusive nature and tendency;
  
- d. the circumstances should exclude every hypothesis but one proposed to be proved. (**Sarkar, at page 34**)

Examination of the question of circumstantial evidence, whenever it crops up in a criminal trial, is not always complete without making reference to some of the earliest decisions made on this point in this part of the world; these cases that have gained relatively enough notoriety are **Republic versus Kipkering Arap Koske & Another (1949) XVI EACA 135** and **Simon Musoke versus Republic (1958) EA 715**. To a great extent, they regurgitate the principles enunciated by Sarkar and earlier English decisions on this question.

In **Republic versus Kipkering Arap Koske & Another**, the Court of Appeal for Eastern Africa, quoting **Wills on Circumstantial Evidence (6<sup>th</sup> Edition, page 311)**, held as follows:

*In order to justify 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. The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any 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.*

In **Simon Musoke versus Republic**, the same court cited with approval the passage from the decision of the Privy Council in **Teper versus Republic (1952) AC 480** quoted in *Tumuheire versus Uganda* (supra).

My analysis of the prosecution evidence against the accused on this question leads me to the conclusion that the inculpatory facts, as far as circumstantial evidence is concerned, have not only been established beyond all reasonable doubt but they are also incompatible with the innocence of the accused; they are also incapable of explanation upon any other reasonable hypothesis than that of the accused's guilt. Finally, I have not found anything in evidence or in the accused's defence that presents co-existing circumstances that can be said to destroy the inference of guilt on his part.

The second prong of evidence on which the prosecution rested its case is, as earlier noted, that of confession. A confession as a term of art is defined in section 25 of the Evidence Act, cap. 80. It reads as follows:

*A confession comprises words or conduct, or a combination of words and conduct, from which, whether taken alone or in conjunction with other facts proved, an inference may reasonably be drawn that the person making it has committed an offence.*

Sections 25A and 26 of the Act describe situations when confessions are not admissible against an accused person. For instance, according to section 25A (1), a confession will not be admissible unless it is made in court before a judge, a magistrate or before a police officer (other than the investigations officer) as long as such an officer is not below the rank of a chief inspector of police and a third party of the accused's choice.

Section 26, on the other hand, is to the effect that the confession must be voluntary; if, for instance, it is obtained as a result of threats, inducements or promises, it will not be admissible against the accused.

It is worth noting that the accused never made any reference to the confession in his evidence in chief. It was only during cross-examination that he denied having written any statement let alone a confession.

His line of defence was, however, self-contradictory because earlier in the trial, his counsel had contested the production of the confession on the basis that it was not voluntary and that it was obtained through inducement and promises. The objection was thus made on the understanding that the accused made a confession except that for the reasons given by his learned counsel, it could not be admitted in evidence. It simply therefore cannot be true, as the accused suggested in his defence, that he neither recorded any form of a statement or a confession for that matter.

When considered in its entirety, the evidence available, though circumstantial placed the accused at the scene. At the risk of repeating myself, the pathologist (PW10) confirmed that the blood on the accused's clothes, which the accused himself admitted were collected from his house, had blood stains of the same DNA profile as his deceased's mother. Again, on the night of the deceased's murder he travelled to his home, where his mother lived if the evidence of Muthaiga (PW5) is anything to go by. This evidence largely corroborates the accused's confession statement.

In its pertinent parts, the confession depicts the accused as admitting that prior to his killing the deceased, they had had a strained relationship; it also places the accused at the scene of murder. He finally thought that he had enough when the deceased wished that he was dead. His anger boiled over; he hit her; snatched a knife from her grip and used the same knife to slit her throat to the extent of almost

decapitating her.

There is nothing either in the form or substance of the statement that suggests that it was tainted in any of the ways contemplated under sections 25A and 26 of the Evidence Act. Despite a thorough cross-examination by the defence counsel, superintendent Mutunya (PW12), who took the confession never wavered in his testimony that it duly complied with the law; in particular, he testified that at the time he took the statement he an officer of the right rank; a chief inspector of police. Again, there was no evidence that the confession was obtained by inducement, threat or promises by a person having authority over the accused, or any person for that matter. The accused's rights were explained to him before the statement was taken.

Contrary to the accused's allegations, there is every reason to believe that the confession was voluntary. It was taken in the presence of a person who was not only a person of his choice but he was also his relative.

I am persuaded to accept the evidence that the accused confessed to the murder of his mother and I see no reason why I shouldn't accept his confession in evidence.

Proof of the death of the deceased by an act of another person; an act which, for all intents and purposes, was unlawful disposes of the three of the primary components of the offence of murder under section 203 of the Penal Code. These elements are death of a person; by an act of another person; and which act is unlawful. This section reads as follows:

### **203. Murder**

***Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.***

Looking at this provision of the law the only outstanding component to complete a case of murder against the accused is that of malice aforethought; in other words, did the accused have the necessary malice aforethought for murder?

Malice aforethought has been described as the mental element for the offence of murder and it is either express, implied or constructive. It is express when it is proved that there was an intention to kill unlawfully (see **Beckford v R [1988] AC 130**), but it is implied whenever it is proved that there was an intention to unlawfully cause grievous bodily harm (see **DPP v Smith [1961] AC 290**).

It has been held to be constructive if it is proved that the accused person killed in furtherance of a felony (for example, rape or robbery) or when resisting or preventing lawful arrest, even though there was no intention to kill or cause grievous bodily harm (see **Raphael Mbuvi Kimasi versus Republic (2014) eKLR; Isaak Kimanthi Kanuachobi versus R (Nyeri Criminal Appeal No. 96 of 2007 (unreported))**).

This element has a statutory underpinning in section 206 of the **Penal Code**; this section prescribes circumstances under which malice aforethought may be deemed to have been established; it provides as follows:

### **206. Malice aforethought**

***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.***

In the accused's own words, he attacked his mother out of anger; it is the kind of anger that had been simmering for several months until the 11<sup>th</sup> day of September when he took a trip to his mother's house and murdered her. The accused related the events leading to the deceased's death as follows:

***“I went back at her place at around 7.30 PM but I did not find her at home. She came back at around 10. PM. I asked her what she wanted me to do after telling her she did not need me hence I had nowhere to go. She started making noise saying I had disturbed her so much I better be dead. This statement really annoyed me and I started to hit her. She took a knife to defend herself but I overpowered her and took the knife away from her. I used the same knife and cut her throat completely. As I was trying to kill her she was shouting saying I was killing her which attracted some neighbours. This incident occurred in her house. When I came back to my senses and realised that I had actually killed, I went away to Ihwagi to hide myself.”***

Thus the accused initiated the fight that ended with his mother's death. When he overpowered her mother, there is absolutely no reason why he should have gone further and literally slaughtered her using the knife that he allegedly snatched from her. According to the evidence of the pathologist, the deceased's head was more or less decapitated.

Taking the accused at his own word, the deceased was already subdued when he snatched the murder weapon from her. It follows, therefore, that his mother posed no danger to him at all or such danger that would have necessitated the kind of response that the accused exhibited.

My point really is, in attacking the deceased in the manner he did, the accused intended to cause the death of his mother or at least to subject her to some grievous harm. He must also have been aware that by literally slaughtering his mother, she was likely to die or sustain some grievous harm though he may not really have cared whether death or grievous harm would result. If he neither wanted to cause death or grievous harm, though the evidence suggests the contrary, he might have wanted to commit some felony. While all these three results were possible, only one of them is enough to establish malice aforethought. It follows that I am satisfied that the state has proved, beyond all reasonable doubt, that the accused's act was informed by malice aforethought.

The inevitable conclusion that I can only come to is to hold the accused culpable for murder of his mother. I therefore find him guilty of the offence of murder as charged. He is convicted accordingly.

**Signed, dated and delivered this 4<sup>th</sup> day of May, 2020**

**Ngaah Jairus**

**JUDGE**