



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NYERI**  
**CRIMINAL CASE NO. 22 OF 2010**  
**REPUBLIC**  
**VERSUS**  
**ERASTUS MWANGI KAMAU**  
**JUDGMENT**

The accused was charged with the offence of murder contrary to Section 203 as read with section 204 of the Penal Code, cap. 63 Laws of Kenya. According to the information, on the 11<sup>th</sup> day of July 2010 at Kanderendu, Makomboki sub location in Kigumo District within Central Province, he murdered John Karanja Wangeche. He pleaded not guilty to the charge.

**Samuel Kamau Macharia** was the first prosecution witness. It was his evidence that he knew both the accused and the deceased.

On 11 July 2010, he met the deceased at Furaha bar at Kanderendu shopping centre. He noticed the deceased's left eye was swollen. The deceased told him that he had been beaten by the accused who also happened to be the deceased's wife's brother.

They found the accused in the bar. One Mercy, whom Macharia described as the deceased's girlfriend, joined them before the deceased asked her to proceed upstairs, in the same bar. Macharia and the deceased were sitting downstairs.

Soon thereafter they heard a commotion upstairs; Macharia went to check and found Mercy being beaten by the deceased's and the accused's wives. He reported back to the deceased; together, they came outside the bar. They found Mercy's attackers holding wooden planks. Macharia returned to the bar, leaving the deceased outside. Mercy joined him and sat at the same table where he was seated. The deceased's and the accused's wives followed her there and started assaulting her. Macharia restrained them at which point Mercy went outside the bar. The deceased told him that Mercy was being beaten. Somehow the door to the bar was closed. Macharia was inside the bar.

When he left the bar, he found the deceased lying in a pool of blood; it was his evidence that he found him dead. The only other person he saw at the scene was the accused who was then standing in the corridor that led to the upstairs part of the bar.

**Peter Kanini Mugu (PW2)** testified that he operated a chemist next to Furaha bar. On 11 July 2010, at about 7:30 P.M. he saw Damaris Njeri and Lena, the deceased's and the accused's wives respectively, standing at the corner of the bar armed with wooden planks. After about half an hour, he went to the bar. He found the deceased and the accused at the corridor together with other people. The door to the downstairs part of the bar was closed. The deceased and the accused were in some verbal exchange; the deceased wanted to proceed upstairs but the accused was somehow restraining him. He was armed with a knife. He saw the deceased push the accused; the accused fell into a urinal facility nearby. The accused rose to his feet and stabbed the deceased on the left shoulder. The deceased attempted to move away but fell a few steps from the scene. It was his evidence that the accused stabbed the deceased 'with a lot of force'. Even after he told the patrons at the bar what had happened, none of them was willing to confront the accused; he escaped behind the shops with the murder weapon. He was later arrested in Athi River.

Mugu testified further that the murder scene was well lit with electricity light. He knew both the accused and the deceased; he had schooled with the accused in the same school.

During cross-examination, he denied that his statement to the police was to the effect that it was the deceased who was walking away with a knife or that he pushed him to the wall. He insisted in re-examination that it was the accused who was armed with the knife and that he stabbed the deceased in the back as he made to leave.

**James Macharia Wangechi (PW3)** testified that the deceased was his brother and that he identified his body in the mortuary for post-mortem on 16 July, 2010.

**James Githiomi Kiburi (PW4)** testified that he saw the deceased's wife quarrelling with Mercy at Furaha bar; they were upstairs where he had gone to buy a cigarette. The ladies came down stairs where he had settled for drink. As Mercy sat down, the deceased's wife hit her with a stick. He restrained her from further assaulting Mercy. As the deceased's wife left the bar, she met her brother, the accused, to whom she handed a knife which she removed from her blouse. He stopped them from entering the bar. After about ten minutes he heard screams from outside. He peeped outside and noticed the deceased lying on the ground. He had been in the bar but apparently he followed the ladies

outside the bar when they were asked to leave.

The bartender, **Mary Wanjiru Gathu (PW5)** testified that the deceased and Mercy had been in the bar as early as 10:00 A.M. on 11 July 2010. She left briefly at 3:00 P.M. and came back at 4:00P.M. The deceased and Mercy came back after she returned to the bar.

While at the counter, Gathu saw some people climb upstairs. She asked Kiburi (PW4) to find out who they were. He reported back that Mercy and the deceased's wife were fighting. The patrons separated them. She asked Kiburi to ask Mercy to come downstairs. Mercy came and sat at some corner. The deceased's wife followed her and assaulted her. As they left the bar, they met the accused who was also coming to beat Mercy.

The patrons restrained the accused from entering the bar and so he remained outside.

While she was in the bar, she heard screams outside. She went there and found that the security light had been switched off. She could not tell who stabbed the deceased.

**David Njuguna (PW6)** testified that he was about to enter the bar when he saw the deceased and the accused emerge from the corridor; ahead of them was the deceased's wife. The deceased was holding his chest while the accused was behind him. The deceased fell a few steps in front of him. He heard the accused say that "he wanted to kill me and now I have killed you". He then disappeared behind the bar. The security lights were on but went off. The witness testified that the accused and the deceased are people he had known for a long time.

**Isaac Maina Wambui (PW7)** testified that he was at the bar on 11 July 2010. According to him, the bar was divided into two sections: the upstairs part and the lower part. At about 7:00 P.M., he went for a short call downstairs. He met the deceased who was coming from downstairs section of the bar. The accused also emerged from the same bar, with his right hand behind his back. He held the deceased by the collar and told him that he was not going to disturb him again. He then stabbed the deceased at the back. Wambui ran and informed the barmaid who was standing at the door. She screamed and alerted those in the bar. They all rushed to the scene and found the deceased slumped to the ground.

The witness testified that he knew the accused as they hailed from the same area; in fact, they were neighbours and also they both went to the same school.

Police constable **Jane Gichiku (PW8)** testified that on 11 July 2010, James Wangechi Macharia reported at Makomboki patrol base that the deceased, who was his brother, had been stabbed. he was accompanied by James Mwathi. She proceeded to the scene, where she found the deceased's lifeless body lying in a pool of blood in the corridor. She found Wanjiru (PW5) at the scene. This was about 9:20 P.M.

The investigation officer was sergeant **Elias Oware (PW9)**. He received the report of the murder of the deceased from the officer in charge of Kigumo police station where he was attached on 11 July 2010 at 22: 30 hours. He proceeded to the scene together with police constable Kimei and their driver. They found the deceased's body at Furaha bar. Upon examination of the body, he observed a wound on the lower side of the back of the deceased below the left shoulder. The white jacket the deceased was wearing had blood stains. They removed the body to Githumu Mission Hospital. On 12 July 2010, they got information from the relatives of the deceased to the effect that the accused had been arrested at Athi River and was being held at Athi River police station.

On 15 July 2010 the deceased's wife was brought to the police station by members of the public. She was also held as suspect in the murder and, as a matter of fact, she was subjected to a mental assessment for purposes of being charged.

In the course of his investigations, he took the accused's and the deceased's wife's blood sample, the deceased's liver and kidney tissues and his blood sample to the government laboratory for analysis. The deceased's stomach contents were also taken for the same analysis. The post-mortem was conducted by Dr. Odinga on 19 July 2010.

It was also his evidence that the scene of the murder was photographed but that he did not have the photographs because the photographs were taken by scene of crime officers.

Corporal Julius Oguna(PW10) testified that on 12 July 2010, at about 2:00 PM he was on patrol duties together with his colleagues at Athi River police station when they were informed by a member of the public that there was a suspect of a murder that had been reported at Kigumo police station. The member of the public led them to the accused who was seated outside a kiosk in Athi River. They arrested the accused; upon interrogation, the accused denied having murdered the deceased. However, when the officers contacted their counterparts at Kigumo police station, they confirmed that the accused was wanted for the offence of murder. They later came to pick him up and took him to Kigumo police station.

Despite several adjournments granted at the instance of the prosecution, the state was unable to procure the rest of the witnesses they intended to call and so corporal Oguna turned out to be the last prosecution witness.

The accused opted to give a sworn statement when he was put on his defence. It was his testimony that he knew the deceased and there was no grudge between them. He admitted that he was at Kandereba shopping centre, more specifically at Furaha bar on 11 July 2010. He was there together with the deceased and the owner of the bar. They were at the bar from 11:00 A.M. The deceased found him there and together they drank till 4:00 P.M. He left together with the deceased to a hotel where they ate and parted ways. He denied that he was at the scene

when the deceased was murdered. He admitted that he was arrested on 12 July 2010 and the deceased's wife was arrested the following day. He denied that he was related to the deceased's wife.

But during cross-examination, the accused admitted that the deceased's wife was in fact his sister. He admitted that Furaha bar had two floors; a ground floor and an upper floor. They were in the ground floor on the material day. He however denied meeting his sister that particular day. It was his evidence that he travelled back to Nairobi on the same day he was at Furaha bar.

And that is as far as the evidence went.

The accused, as noted was charged under sections 203 and 204 of the Penal Code; the former provision is the only relevant provision; the latter provision has been rendered inconsequential following the Supreme Court decision in **Supreme Court Petition No. 15 of 2015 Francis Karioko Muruatetu & Another versus Republic (2017) eKLR**.

Section 203 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.***

Thus, the fact and cause of death of the deceased are amongst the necessary elements in proof of this offence. Other elements which the prosecution would also be required to prove are that the act or omission causing the death in question was unlawful and that the perpetrator had malice aforethought.

More often than not, proof of death does not elicit much debate; in most cases post-mortem reports would be produced by pathologists or medical officers not only certifying the death but also giving their opinion on the cause of death.

In the case against the accused, there is evidence that a post-mortem was conducted on the body John Karanja Wangeche but the doctor or doctors who conducted the post-mortem did not testify.

Nonetheless, there is evidence that the deceased was stabbed and died on the spot.

According to Samuel Kamau Macharia (PW1), the deceased was somebody he knew. He was with him moments before he was stabbed to death. Mugu (PW2) not only witnessed the accused stab the deceased, but it was also his evidence that the deceased died on the spot. Gathu (PW5) testified she knew the deceased and that the police removed the deceased's body from the scene where he had collapsed after being stabbed to the mortuary. Njuguna (PW6) saw the deceased collapse at the same spot. The deceased's brother, Macharia Wangechi (PW3) testified that he identified his brother's body in the mortuary for post-mortem purposes. The investigation officer confirmed that he together with his colleagues removed the body from the scene to Githumu mission hospital. He further testified that one Dr. Odinga conducted the post-mortem.

Thus, despite the absence of evidence of the pathologist, there is sufficient evidence of the fact of death of the deceased.

It would, of course, have been ideal for the pathologist to present his findings to court but despite numerous adjournments granted at the instance of the state to enable this particular witness attend court, he never appeared. The learned counsel for the state finally closed the prosecution case when it turned out that regardless of how many times the court was prepared to adjourn the case, the doctor had vowed never to attend the court until he was paid; to quote the learned state counsel when he closed his case:

***"I am not ready to proceed since I do not have witnesses. One of the witnesses is Dr. Odinga who told me that he will never attend court. He said it is a waste of time for him to travel from Migori to Nyeri and go back home empty handed. The other witness is Dr Mwangi. We have endeavoured to serve the medical superintendent in vain."***

As much as the evidence of a doctor who conducts the post-mortem is necessary, the circumstances are such that failure to attend court by the one who performed the post-mortem on the deceased in present case cannot be said to be fatal to the prosecution case. I say so because, going by previous decisions by the Court of Appeal on this question, there are certain circumstances in which a trial court may still find that a murder was committed despite the absence of a medical report, or to be precise, a post-mortem report in that regard.

In discussing the decision of the High Court of Tanzania in **Republic versus Cheya (1973) EA 500** where this question arose, the Court of Appeal in **Nairobi Criminal Appeal No. 171 of 1984**, reported as **Ndungu versus Republic (1985) eKLR** spoke of this sort of evidence in the following terms:

***The judgment in Cheya gives no report of what injuries were sustained although there is reference to vicious assault, bleeding in several places and that the deceased was assaulted by a group of people. That decision does not illustrate the proper application of the principle that in some cases death can be established without medical evidence. Of course there are cases for example where the deceased person was stabbed through the heart or where the head is crushed, where the cause of death would be so obvious that the absence of a post-mortem report would not necessarily be fatal. But even in such cases, medical evidence of the effect of such obvious and grave injuries should be adduced as opinion expert evidence and as supporting evidence of the case of the death in the circumstances relied on by the prosecution. Where a post-mortem report is performed and a report prepared, signed and kept in safe custody, but the doctor is not available some other medical expert could give general evidence as an expert, on the basis of the report as to whether the findings of the report are consistent with the case for the prosecution.***

***Even where the doctor is available it is necessary for him to correlate his opinion with the case for the prosecution. Another***

*class of case where there is no medical evidence is the exceptional case where the body has never been found; but we are not dealing with that class. (Emphasis added)*

The same court followed this decision in **Chengo Nickson Katama versus Republic (2015) eKLR** where the deceased died two days after the attack. In this case the post-mortem report was not produced. The deceased had also been in several hospitals leading the court to doubt whether death could have been as a result of the injuries sustained during the attack or by other cause.

The court noted as follows:

*Our next consideration is failure by the prosecution to tender medical evidence regarding the death of the deceased. On record, there is evidence that following the death of the deceased, a post-mortem examination was conducted on his body on 7<sup>th</sup> February, 2011 by Dr. Otieno of Coast General Hospital and a report thereof prepared. However, attempts to introduce the same in evidence faltered on account of Dr. Otieno's failure to turn up in court severally for unexplained reasons. Therefore, the prosecution closed its case without the post-mortem report being placed on record. The effect of such an omission is that the death and the cause thereof was not established beyond reasonable doubt. The deceased did not die immediately. Indeed, he died two days later whilst undergoing treatment at Coast General Hospital where he had been transferred, as Lamu District Hospital was ill-equipped to manage his condition. It is also important to note that before being transferred to Coast General Hospital as aforesaid, he was first treated at Mokowe Health Centre and Lamu District Hospital. The treatment records from all these institutions could but were not availed. In the absence of these documents indicating the exact treatment which he received, it is not possible to tell whether the death could have been as a result of the injuries sustained or by any other cause. (emphasis added)*

The court then reflected on its earlier position in the Cheya case and concluded that “*the position then appears to be that save in very exceptional cases stated above, it is absolutely necessary that death and the cause thereof be proved beyond reasonable doubt and that can only be achieved by production of medical evidence and in particular, a post-mortem examination report of the deceased.*” (emphasis added).

In short, these decisions demonstrate that there are circumstances where death of a person may be proved without expert evidence. As a matter of fact, according to the Court of Appeal in **Ndungu versus Republic** Case, there exists a “*principle that in some cases death can be established without medical evidence.*” According to the court some of these cases include cardio injuries arising from stab wounds, shattered skulls or disappearance of a person.

The list is obviously not exhaustive but the latter decision of **Chengo Nickson Katama versus Republic** would suggest that where the deceased dies instantly, proof of the fact of his death by other corroborative evidence than by medical evidence is more likely to be accepted as sufficient. In doubting the cause of the deceased's death in that case, the court reiterated that “*the deceased did not die immediately*” and, owing to the time lapse between the time the deceased was assaulted and the time he died, the court was of the view that it is possible that he could have died of other causes and not necessarily of the alleged cause.

In my humble view, the death of the deceased here is beyond circumspection. He collapsed and died as soon as he was stabbed. It is logical to conclude, therefore, that based on the evidence before court, the deceased not only died but that he died as a result of the stab wound inflicted on him.

The next question is whether the accused is the person who inflicted the fatal blow. The prosecution's case is that indeed he was. The accused, on the other hand has proffered what in effect is an alibi. It was his defence that while it is true that he was at Furaha bar, the scene of crime, at some point in time on the material date, he was not there when the deceased was stabbed.

When I consider the prosecution evidence, the accused is not only placed squarely at the locus in quo but there is also both direct and corroborative evidence that he stabbed the deceased.

Take the evidence of **Macharia (PW1)** for instance; he testified that he was with the deceased when they found the accused in the bar. He saw the accused and the deceased in the corridor. Moments later, the deceased was stabbed after which the accused disappeared. This evidence was corroborated by **Mugu (PW2)** who testified that he went to the bar at about 8:00 P.M. and found both the accused and the deceased in the same corridor where Macharia (PW1) saw them. They were either quarrelling or were involved in some bitter exchange. In fact, according to Mugu, the confrontation turned physical when the deceased pushed the accused to the ground or, in his own words, “into the urinal”. The accused rose to his feet and stabbed the deceased with the knife which he was armed with. The witness was particular that the deceased was stabbed on the left shoulder and that the accused stabbed him “with a lot of force.” He saw the accused leave with the

murder weapon. It was also his evidence that the deceased and the accused are people he knew well and there was electricity light at the scene. The question of mistaken identity could not arise. He explained that part of his statement to the police that read that he saw the deceased leave with the knife was a mistake on the part of the person who wrote the statement. And this appears understandable because further down the statement read as follows:

**“At the corridor was Mwangi armed with a knife next to him was Maina and on the right hand side was Karanja. I asked them why the door was locked. Mwangi told me to knock first.”**

Even if it was to be assumed that that the deceased either left with the knife or was somehow holding it, he certainly could not have stabbed himself from the back; somebody stabbed him and, the various eyewitness’ accounts point to the accused as that person.

Again, **Kiburi (PW4)** who was at the scene, not only saw the accused but he also saw his sister hand over a knife to him moments before the deceased was stabbed. His evidence was never challenged or controverted.

On his part, **Njuguna (PW6)** bumped into the accused, the deceased and his wife at the murder scene. He made a few steps forward before he collapsed. The witness heard the accused say “he wanted to kill me and now I have killed you”. He then disappeared behind the bar.

**Wambui (PW7)** also saw the accused stab the deceased as the deceased turned his back to him. The deceased stabbed him at the shoulder. The investigation officer (PW9) observed that the stab wound was on the lower side of the back below the left shoulder.

So, there is evidence of at least five witnesses who either saw the accused at the scene of murder soon before the deceased was murdered, or saw him armed with the murder weapon or saw him stab the deceased. There is nothing in their testimony which suggests that they were not credible witnesses or had conspired to frame the accused. I am satisfied that their evidence points only to one irresistible conclusion that the accused is the person who stabbed the deceased.

The final question for determination is whether malice was established. Malice is either express or implied. (See **Woolmington v DPP [1935] AC 462**). It is express when it is proved that there was an intention to kill unlawfully (see **Beckford v R [1988] AC 130**) and it is implied whenever it is proved that there was an intention unlawfully to cause grievous bodily harm (see **DPP v Smith [1961] AC 290**).

Malice can also 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 concept has a statutory underpinning in **Section 206** of the **Penal Code** which prescribes circumstances under which malice aforethought may be deemed to have been established; that provision of the law states 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.**

According to Njuguna (PW6) he heard the accused utter the words

**“You wanted to kill me but I have killed you so wake up and kill me”.**

In considering whether these utterances would explain malice or motive, they are certainly part of *res gestae* which evidence is admissible under section 6 of the Evidence Act, cap. 80. That section reads as follows:

**6. Facts which, though not in issue, are so connected with a fact in issue as to form part of the same transaction are relevant whether they occurred at the same time and place or at different times and places.**

The words were uttered soon after he had assaulted the deceased; thus they were not only nearly contemporaneous with the murder of the deceased but they also explained the fact of the murder itself.

According to Mugu's (PW2's), evidence the accused stabbed the deceased 'with a lot of force'.

The fact that the deceased died on the spot would give credence to this evidence that the single blow inflicted on the deceased was fatal enough.

Going by the accused's utterances and the force with which he struck the deceased, it is apparent that he had an intention to cause the death of or to do grievous harm to the deceased or he was simply reckless that his act would probably cause the death of or grievous harm to the deceased. Either way, the criminal intent was established. I am therefore satisfied that the prosecution has proved the offence of murder as defined in section 203 of the Penal Code beyond all reasonable doubt. I therefore find the accused guilty as charged and convict him accordingly.

**Signed, dated and delivered this 10<sup>th</sup> day of July, 2020**

**Ngaah Jairus**

**JUDGE**