



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**MILIMANI LAW COURTS**

**HIGH COURT CRIMINAL CASE NO 113 OF 2015**

**REPUBLIC.....RESPONDENT**

**VERSUS**

**DAVID MWANGI GITHAMBU.....APPLICANT**

**JUDGMENT**

**INTRODUCTION**

1. On the morning of 30<sup>th</sup> November, 2015 **PW6 INSP. ALVIN MATARA** was at his office in Naivasha at the crime Section of the police station, when **APC GICHANGA** walked in with a gentleman who wanted to make a report, that sometime in the year 2013 at a place called KIORA, in Kinoo Nairobi, he together with a friend called MURAYA had killed his father. As a trained police officer he booked the report and proceeded to interview the accused, who confirmed that he together with Muraya had killed his father whose name he gave as **ERICK GITHAMBU MWANGI**, for refusing to assist him financially and having sold the family farm in Naivasha.

2. Though the accused appeared disoriented, he stated that they had strangled the deceased. Acting upon this information, he made inquiries from DCIO Dagoretti and confirmed that there was a case pending investigation which was similar to the facts as given by the accused. His first impression of the accused was that he was under stress. He then booked the accused into the police cell, from where he was before he was collected by the police officer from Nairobi, to face the charge herein. On 21/1/2016 he took plea for the offence of murder wherein a plea of not guilty was recorded and his trial thereafter commenced before me.

**PROSECUTION CASE**

3. To prove its case, the prosecution called and examined a total of ten witnesses whose testimony is summarized herein for the purposes of this judgment.

4. **PW2 MARIA WATHERE MWANGI** a step mother to the accused testified that on 29<sup>th</sup> October, 2013, the accused went to visit his father whom she was living with as a second wife having come from Naivasha where she was living with his mother. They went to the butchery to buy some meat for which the accused gave her Kshs.200, which she was to refund later on. While she was cooking the accused left with the deceased to go and buy him changaa, only for him to later on return home alone and demanded from her the log book for the deceased motor vehicle which he was using as a taxi.

5. He then told her that he had left the deceased with another woman and decided to take her to the place where he was. She noticed that the accused had an injury on his leg and was limping while walking. While they were on the way to the house where the accused had allegedly left his father, somebody came from behind and held her by the neck and started to strangle her. She fell down and pretended that she had died. The accused then came and stepped on her, she heard him saying that she did not have strength unlike “the other one”. The accused and the other two people he was with ran away leaving, her at the scene from where she was rescued by a watchman who took her to the place he was guarding.

6. The accused and his group later on returned to the scene looking for her body presuming that she had died and she could see them from her hiding place. She subsequently went home and slept until the next day when a neighbour went to her at 6.00 a.m. and told her to go and check on the body of the deceased. She proceeded to Kabete police station where she made a report and found the deceased motor vehicle which he used to keep at the station there. The body of the deceased was subsequently taken by the police. It was her evidence that the last time she saw the deceased alive, he was in the company of the accused.

7. She confirmed that the deceased had sold his plot at Kayole in Naivasha, the proceeds of which he had deposited in a bank and that after the burial he met with the accused at the police station, with his mother and a sister of the deceased called Monica but the accused was released by the police despite the fact that he had filed a complaint against him in respect of the death of his father

**8. PW3 PAUL GABRIEL GITHAMBA** a brother in law to the deceased testified that on 30/10/2013 he was called by his wife (a sister of the deceased) with the information on his death and went to the scene where the body was before it was taken to the mortuary. **PW5 CORP. HENRY NJUGUNA** received the report on 30/10/2013 on the death of the deceased and proceeded to the scene where he found the accused at the scene together with PW2 whom he interrogated. He interrogated the accused who confirmed that he was working as a conductor on Naivasha – Nairobi matatu route and that on the material day had come to Nairobi to look for the deceased who met with him.

**9. PW1 PC JOSEPH GATHECA** a scene of crime officer went to the scene and took photographs of the body of the deceased which had a fresh injury on the neck. **PW7 ANNA WANGUI MBUTUI** (the mother of the accused) stated that on the material day she received a phone call from the accused who informed her that the deceased had been killed and had gone to his place where he confirmed his death.

**10.** She stated that the deceased had been given a plot by his father which he sold an action which she did not approve of having put a caution on the plot, through the advice of her mother-in-law and that after selling the plot, the deceased bought a motor vehicle. It was her evidence that after the death of the deceased the accused would sometimes say things which did not make any sense.

**11. PW4 MONICA NJERI MWANGI** a sister to the deceased and an aunt to the accused testified that on 29/10/2013, while at Naivasha, was called on phone by someone at 6.30 a.m. from unknown number and informed that the deceased was sick. She was then given directions to where he was living in Nairobi. She proceeded to the place in the company of her sister called Barnice and a friend called Gathua, where they found the body of the deceased at the scene, she was told by PW2 whom they found at the scene, that the deceased had left with the accused the previous night. She called the accused on phone, who told her that he was in Dandora, then he changed that he was at Kijabe and later on that he was on the way to the scene. After twenty minutes the accused came to the scene.

**12.** It was her evidence that the accused clothes were soiled and he had black jack plants on them. When she asked him what had happened to him, he did not respond, he further declined to go and look at the body of his father. The following day she attended to the post mortem in the presence of the accused and his mother (PW7) and thereafter they buried the body at Langata cemetery. After the burial the accused asked for the motor vehicle together with its log book, which he was given.

**13.** Three days after the burial, the accused went to her place in Naivasha, at a plot which had been given to him and the deceased by his grandfather, which she was taking care of and requested for Kshs.10,000/- to start a second hand clothes business. She informed PW7 of the request before sending the money. Three days thereafter the accused came to the place together with household items and wife. She gave them an empty room to settle in. Three days after he had moved in, he came to the plot and started to destroy floor pots throwing them into the room where she was operating a bar. When she asked him what the problem was, he told her that he had killed his father and would kill anybody else. She reported him to the police who arrested him. The next day the accused requested her to forgive him.

**14.** She thereafter moved out of the plot, having handed over all the property of the deceased she had in her custody to the accused and his mother. About two years after the death of the deceased she received a call from someone who informed her that there was a problem at the deceased plot, from where she had moved out. When he got to the plot, she was told that the accused had the previous night been said that he had strangled his father with someone called Muraya and that the deceased was pricking him with needles and removing his flesh and that he had earlier reported to the AP Camp where he was advised to report to Naivasha police station and that is how the accused was subsequently arrested and later on transferred to Nairobi to be charged.

**15. PW8 DR. JOSEPH MAUNDU** examined the accused and confirmed that he was mentally stable **PW9 PC VINCENT SIRO** re-arrested the accused at Naivasha on 1/11/2015 where he had reported to the police station, that he had killed his father in the year 2013 whose statement had been recorded by **PW5 INSPECTOR MATARA ASANGO**. He thereafter recorded statements from the witnesses including PW2, whose evidence corroborated the accused alleged confession to the police. It was his evidence that he formed an opinion that the motive for the offence was that the accused wanted to inherit the property of his father.

**16. PW10 DR. ODUOR JOHANSEN** examined the body of the deceased and prepared a post mortem report thereon and confirmed that the same had extensive bruises on the neck, the hands. He had sainosis and as result of the said examination, formed an opinion that the cause of death was asphyxia due to manual strangulation.

#### **DETERMINATION**

**17.** When put on his defence, the Accused gave sworn statement in defence and stated that before his arrest he was living in Naivasha where he was a bodaboda rider. He stated that he was arrested together with one of his friends after he had taken a new brand of alcohol which affected him. Since he was living next to the Area chief, he met him on his way and the Chief inquired of him about his status. He then instructed him to go to the police station where he was arrested, interrogated and referred to Kabete police station.

**18.** It was his evidence that the Investigation Officer would constantly remove him from the call and take him to places where they would assault him. He confirmed that PW2 was his step mother. He further confirmed having been called by Monica PW4 on the death of his father and that later PW2 took him to a plot 87 where the deceased had been assaulted and he thereafter went back to Kijabe. He confirmed having been given the motor vehicle belonging to the deceased and that as per the will of his father, PW4 was supposed to leave the plot where she was living at. She later on called him and gave him money to start Mutumba business. He thereafter left Kijabe for Naivasha where PW4 welcomed him.

**19.** He testified that after one week PW4 suggested that they sell the deceased plot and she thereafter gave him letters of allotment to the plot which he took to his mother. In cross examination he stated that the deceased and PW2 used to live in Kinoo and that when the deceased and his mother separated he went away with her, but later on went to live with his paternal grandparents. He stated further that there was no

grudge between him and his step mother, since they used to drink together. He claimed that his arrest was engineered by PW4 and that he only went to the police station through the advice of his area chief.

### SUBMISSIONS

20. At the close of the defence case, the accused filed written submissions while Mr. Okeyo made oral submissions. It was submitted by Ms Ajiambo for the accused, that the OB extract from Naivasha police station on the report made by the accused at the station was not produced. She submitted that there were contradictions in the evidence of PW2, PW4 and PW5. It was submitted that the accused was made to sign an alleged confession which did not meet the set standards under Section 25A of the Evidence Act, in support of which the following cases were submitted: -

- a) REPUBLIC v JAMES OBONGO ABEL Nairobi HCCRC No. 111 of 2013
- b) REPUBLIC v PASCAL OCHEING OYOKO SIAYA HCCRC No. 22 of 2017.

21. It was submitted that the circumstantial evidence tendered by the prosecution did not meet the threshold to link the accused with the offence, to warrant his conviction and therefore the case was not proved beyond reasonable doubt.

22. Ms Gikonyo for the prosecution, submitted that the accused was the last person to be seen with the deceased, only for him to inform PW2 - his step mother that the deceased had gone with another lady and offered to take her to the lady, only for her to be attacked on the way. She made a report to the family and the police on the involvement of the accused in the death of his father, but nobody believed her. It was submitted that the motive for the crime was land dispute between the deceased and the accused's family. It was submitted that the accused was linked to the death of his father through PW5 and PW6 who recorded the accused confession as corroborated by PW1. She submitted that even though there was no proper confession, the accused conduct and action connected him to the offence having been on the run for two years.

### ANALYSIS AND DETERMINATION

23. To sustain a conviction on a charge of murder, the prosecution is under legal and evidential duty to prove:-

- a) *The fact and cause of death.*
- b) *That the said death was caused by unlawful act of omission or commission on the part of the accused person.*
- c) *That it was caused with malice aforethought as defined under Section 206 of the Penal Code.*

24. The fact and cause of death of the deceased is not in dispute. The fact of death was proved through the evidence of PW2 his wife. PW1 police officer who processed the scene, in the company of PW5, PW3 the brother in law, PW4 his sister and PW7 the accused mother (the 1<sup>st</sup> wife of the deceased) together with the accused, all who confirmed the death and the burial of the same at Langata cemetery. The cause of death was confirmed by the evidence of **PW10 DR. JOHANSEN ODUOR** to be asphyxia due to manual strangulation. He produced a post mortem report confirming the cause of death. The accused in his defence confirmed that the deceased died and was buried. As at the time of this judgment, there was no evidence of the same raising from the dead either through the power of Jesus Christ or any of the later day prophets and magicians, who claim that they have power to bring the dead back to life. It therefore follows that the fact and cause of death were proved beyond any reasonable doubt.

25. On whether the said death was caused by an unlawful act on the part of the accused person, there is no direct evidence of any of the prosecution witnesses who saw the accused kill the deceased. Save for the evidence of the accused alleged confession at Naivasha the prosecution case was solely based on circumstantial evidence. The law on circumstantial in Kenya was stated by this court in the case of **REPUBLIC v ELIZABETH ANYANGO OJWANG [2018] eKLR** thus: -

***“21. For the prosecution to sustain a conviction on circumstantial evidence the Court of Appeal in the case of SAWE v REPUBLIC [2003] eKLR had this to say:-***

***“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 chain of circumstances relied upon. 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 remain with the prosecution. It is a burden which never shift to the party accused.”***

***22. In a case depending largely upon circumstantial evidence, there is always a danger that conjecture or suspicion may take the place of legal proof. The court must satisfy itself that various circumstances in the chain of events must be such as to rule out a reasonable likelihood of the innocence of the accused. When the important link goes, the chain of circumstances get snapped and the other circumstances cannot in any manner establish the guilt of the accused beyond all reasonable doubt. The court must be watchful and avoid the danger of allowing the suspicion to take the place of legal proof for sometimes unconsciously it may happen to be a short step between moral certainty and legal proof. There is a long mental distance between “may be true” and “must be true” and the same divides conjectures from sure conclusions, see NAVANEETHA KRISHNAN v THE STATE BY INSPECTOR OF POLICE – SUPREME COURT OF INDIA, CRIMINAL APPEAL NO. 434 OF 2013.***

**23. From the line of authorities on circumstantial evidence the court has to judge the total cumulative effect of all the proved circumstances each of which reinforces the conclusion of the guilt of the accused person and if the combined effect of such circumstances is taken to be conclusive in establishing the guilt of the accused the conviction would be justified.”**

26. In this case there is the evidence of PW2 MARIA WATIRI WANJIRU step mother of the accused and the wife of the deceased, to the effect that on the material day the accused had come to visit his father and that while she was still cooking supper for them, the accused left with him for the purpose of buying for him changaa. He later on came and informed her that he had left the deceased with another woman and volunteered to take the witnesses so as to go watch her husband’s plundering nature, only for her to be attacked on the way. She then heard the accused and his group say that she had died faster than the other one which I understand to mean that the other one was the deceased who did not die faster.

27. The prosecution case as submitted by Ms Gikonyo was based on the circumstantial evidence of the last seen with, which was explained in details by Justice Lesiit in the case of **REPUBLIC v EKK [2018]eKLR** in which the Judge had this to say:-

**“43. Regarding the doctrine of “last seen with deceased” I will quote from a Nigerian Court case of Moses Jua V. The State (2007) LPELR-CA/IL/42/2006. That court, while considering the ‘last seen alive with’ doctrine held:**

***“Even though the onus of proof in criminal cases always rests squarely on the prosecution at all times, the last seen theory in the prosecution of murder or culpable homicide cases is that where the deceased was last seen with the accused, there is a duty placed on the accused to give an explanation relating to how the deceased met his or her death. In the absence of any explanation, the court is justified in drawing the inference that the accused killed the deceased.”***

**44. In yet another Nigerian case the court considering the same doctrine, in the case of Stephen Haruna V. The Attorney-General Of The Federation (2010) 1 iLAW/CA/A/86/C/2009 opined thus:**

***“The doctrine of “last seen” means that the law presumes that the person last seen with a deceased bears full responsibility for his death. Thus where an accused person was the last person to be seen in the company of the deceased and circumstantial evidence is overwhelming and leads to no other conclusion, there is no room for acquittal. It is the duty of the appellant to give an explanation relating to how the deceased met her death in such circumstance. In the absence of a satisfactory explanation, a trial court and an appellate court will be justified in drawing the inference that the accused person killed the deceased.”***

**45. Quoting from another jurisdiction, to be specific India, the courts there have developed that doctrine further. In the case of Ramreddy Rajeshkhanna Reddy & Anr. v. State of Andhra Pradesh, JT 2006 (4) SC 16 the court held:**

***“that even in the cases where time gap between the point of time when the accused and the deceased were last seen alive and when the deceased was found dead is too small that possibility of any person other than the accused being the author of the crime becomes impossible, the courts should look for some corroboration.”***

28. Having been placed as the last person seen with the deceased while alive, the accused had the statutory burden to discharge a rebuttable presumption to explain how the deceased died, as provided for under Section 111(1) and 119 of the Evidence Act. In discharge of this burden, the accused in his defence denied having been with the deceased and that he only went there after his death but this evidence is contradicted in material particulars by that pf PW2 and PW4 who placed the accused at the scene. The accused in his defence stated that he had no grudge with PW2 and therefore see no reason why PW2 who almost died at the hand of the accused and his group as per her evidence would have made up a false case against him. There is also the evidence of PW4 who was called to the scene and who later on called the accused who could not give her the exact location where he was only for him to appear at the scene after twenty-five minutes thereby putting himself with the general area of the scene.

29. I am therefore satisfied that the accused failed to discharge the evidential burden placed upon him to explain what happened to the deceased which he only did after a period of over two years when he presented himself to the police station at Naivasha to PW5 who should have recorded a confession from him when he confessed that he had killed his father and that the same was following him and he wanted to come clean.

30. As submitted by the accused; PW6 did not comply with the requirement of Section 25A of the Evidence Act while taking the accused alleged confession and therefore the alleged confession is not admissible in evidence. This is confirmed by the fact that the said confession was not produced as such during the trial of the accused. However, the evidence of PW6 was corroborated in material particulars by that of PW4 (the accused aunt) who confirmed that the accused had confessed at the plot where he was living and had told her daughter that he had killed his father and was therefore not afraid of killing somebody else. This confession when looked at against the evidence of PW2, is my considered view admissible as part of *resgestae* which is provided for under Section 57 of the Evidence Act which provides as follows: -

**“S. 57(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.**

31. In the case of **RATTEN v THE QUEEN [1971] 3 AER 801** Lord Wilberforce said at page 803

***“When a situation of fact (e.g. killing) is being considered the question may arise when does the situation begin and when does it end. It may be arbitrary and artificial to confine the evidence to the firing of the gun or the insertions of the knife without knowing in broad sense, what was happening. Thus in Oleary V Regina evidence was admitted of assault prior to a killing committed by the accused during what was said to be a continuous Orgy, AI Dixon, J, said***

*“without evidence of what, during what time, was done by those men who took any significant part in the matter and especially evidence of the behavior of the prisoner, the transaction of which the alleged murder formed an integral part could not truly understand and isolated from it, could only be presented as an unreal and not very intelligible event.”*

32. I therefore take the view that the accused conduct at Naivasha leading to his “confession” at Naivasha to the police which led to his arrest formed part of the transaction which led to the death of the deceased and corroborated the evidence of PW2 in all material particulars who had positively identified the accused and placed him at the scene of the murder and therefore formed part of the circumstantial evidence linking the accused to the offence.

33. The evidence of the conduct of the accused immediately after the commission of the offence, through PW2 and PW4 (MONICA) and PW7, his mother and his subsequent conduct two years later on at Naivasha which I find to be part of a series of connected events to prove the commission of the offence and the accused state of mind were relevant to the prosecution case and are admissible in evidence and as stated by Dixon J, in O’leary (supra) implicated him in the murder.

34. It therefore follows and I hold that the circumstantial evidence tendered by the prosecution which included the fact that he was the last person seen with the deceased while alive, his conduct at the scene where the body of the deceased was including the fact that when first called by PW4. He gave contradictory statement on his whereabouts and his failure to go near or look at the body of the deceased, his demand of the log book and the keys to the deceased motor vehicle, the Bank cards from PW4 and subsequently getting her out of the plot belonging to the deceased and his conduct two years thereafter leading to his admission that he had killed the deceased who was haunting him, together with the direct evidence of PW2 who put the accused at the scene, irresistibly point to the accused and nobody else to have caused the death of the deceased.

35. The accused defence that he was framed up by **PW4 MONICA** is unbelievable as it was his evidence that there was no grudge between him and the said witnesses. The evidence of PW4 that she gave all the documents which she held on behalf of the deceased, including Bank cards and details of the accounts held by her deceased brother including title deeds, which was corroborated by the accused, his mother and PW2 makes the accused allegations against her unbelievable. I am therefore satisfied that the accused defence was an afterthought and did not challenge the prosecution case.

36. The final issues for determination is whether the death was caused with malice aforethought: - There is uncontroverted evidence that the deceased who had separated with the accused mother, had sold a family plot the proceeds of which he used to buy a taxi and the balance thereof put in a fixed deposit account with Equity Bank as per the evidence of PW4. The accused mother through the advice of his grandmother had put a caution on the said land and therefore the sale did not go well with the accused. Immediately the deceased was killed, the accused went back to the house of PW2 and demanded for the log book and the key to the car.

37. There is unchallenged evidence that after the burial of the deceased, the accused took possession of the said motor vehicle and the deceased Bank account. He subsequently took possession and control of the deceased plot at Naivasha, which was then under the control of PW4, which thereof provided the motive for the commission of the offence thereby proving malice aforethought.

38. From the post mortem report, the cause of death was strangulation which confirmed that the accused had the intention of and indeed succeeded in causing the death of the deceased, his father, with the sole purpose or motive of inheriting his earthly property, which he succeeded in doing and peacefully started to enjoy the same, until he was, in his own words, attacked by demonic forces or as he stated in his report to the police the deceased started to haunt him creating for his pain and suffering which led him to set the record right.

39. I am therefore satisfied and hold that the death of the deceased, **ERICK GITHAMBU MWANGI** was caused by unlawful act on the part of the accused person, with malice aforethought and that the prosecution proved all the elements of the offence beyond any reasonable doubt and therefore find the same guilty and convict him accordingly of murder contrary to Section 203 of the Penal Code.

**Dated, Signed and Delivered at Nairobi This 4<sup>th</sup> Day of November, 2020 Through Microsoft Teams.**

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**J. WAKIAGA**

**JUDGE**