



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

(CORAM: C. MEOLI, J)

CRIMINAL CASE NO. 2 OF 2014

REPUBLIC.....PROSECUTOR

VERSUS

DAVID MAINA KAROKI.....ACCUSED

J U D G M E N T

1. The Accused herein, **David Maina Karoki** is charged with Murder contrary to Section 203 as read with Section 204 of the Penal Code. In that on the night of 6th November, 2014, at Site Estate, Gilgil, he murdered **Lilian Wairimu Macharia**. The Accused pleaded not guilty and was represented at the trial by Mr. Mugambi.
2. Through 12 witnesses, the prosecution case was as follows. The deceased, **Lilian Wairimu Macharia** was employed as a teacher at **Roots Academy, Nakuru** in the material period. She was married to or involved with the Accused as a fiancée and cohabiting with him. The living arrangements of the couple were that the Accused resided at rented premises at Gilgil. The deceased was accommodated at teachers' quarters at school where the Accused visited her twice a week. The deceased traveled to the couple's Gilgil home on weekends.
3. On 5th November, 2014 the deceased was on duty with colleagues including **Maureen Kerubo Masita (PW1)** and a neighbour at the teachers' quarters, **Jane Ambani (PW8)**. The deceased was supervising students' prep during the night of 5th November 2014. At 7.30pm **PW8** went to the class the deceased was supervising intending to collect her house keys. **PW8** lingered on hoping to leave in the company of the deceased at the end of prep time.
4. Before that time, however, the Accused came to the class and asked for the keys to the deceased's house. When preps ended **PW8** parted with deceased, each going to their quarters. At 11.00pm, the Accused contacted a taxi operator who resided at Gilgil. The taxi operator **Samuel Mwaura Mwangi** a.k.a. **Sammy (PW7)** was well known to the Accused. The Accused informed **PW7** that he was at Nakuru and was feeling unwell. He wanted **PW7** to take him to hospital. He gave **PW7** directions and instructions on the information to give the school watchman to let him in.
5. **Letima Lempakani (PW3)** was the night watchman on duty at Roots Academy on that night. When **PW7's** vehicle approached the school gate after midnight, he was informed by **PW7** that his mission was to pick up a patient in the teachers' quarters. **PW3** therefore allowed **PW7** to enter the school.
6. Guided by the Accused **PW7** found the deceased's residence in the teachers' quarters. In the deceased's room, **PW7** met the deceased lying on a bed. Seemingly, she didn't want to accompany the Accused who was pressuring her to do so. She cried while refusing to accompany the Accused but eventually relented, got up and started to dress up. Meanwhile, the Accused and **PW7** proceeded to the car. It was while they waited for the deceased to join them that the Accused complained to **PW7** about the deceased's alleged infidelity. Eventually, when the deceased joined them, the Accused reclined his seat, lying down as **PW7** drove out.
7. He instructed **PW7** to drive them to the Catholic Hospital at Gilgil. On arrival there, the couple disembarked and entered the hospital, returning after a few minutes later the Accused in possession of supposed drugs. **PW7** then dropped the couple at their home at **Site, Gilgil**, the Accused and deceased advising him that the latter need **PW7** to take her back to school early on the next day. **PW7** never heard from the couple on the next day even after trying to raise the Accused by phone.
8. The school community was alarmed on the next day (6th November, 2014) having noted that the deceased could not be found in school or on phone. They started searching for her and **PW1** eventually obtained contacts and called the deceased's father, **George Macharia Muruga (PW6)**. Together with his wife **Anne Wambui Macharia (PW2)** and their son **Kennedy Macharia (PW4)**, **PW6** decided to travel to Gilgil, having received information that the deceased had allegedly escorted the Accused to hospital on the night of 5th November, 2014.

9. The trio arrived in Gilgil on the morning of 7th November 2014. They contacted and were joined by **Eunice Mugure Karoki (PW5)**, the Accused's mother. **PW5** led the trio to the Accused's rented house at the place known as Site in Gilgil. The house consisted of two rooms. The door was locked from inside. Through a broken window, **PW4** saw that the house appeared disheveled, with house items scattered everywhere. **PW4** moved to the bedroom window. It was unlocked. He peeped into the room and saw the deceased and the Accused lying in bed. He stopped his mother from viewing the room as he and his father rushed to inform the police. Nonetheless members of public who had by then gathered at the scene broke into the house.

10. Upon entering, **PW2** and **PW5** noted that the deceased was dead while the Accused seemed unconscious. The pillow on which the deceased's head rested was stained with blood. Blood was oozing from the deceased's mouth and the nose. A bucket, containing a blood-stained knife, a colorless liquid and a piece of rope was by the bed. Presently, Police arrived, took photos and collected the body. The Accused was taken to hospital. He was admitted and treated for organophosphate poisoning.

11. On 8th November 2014 **Dr. Titus Ngulungu (PW10)** conducted a post mortem examination on the body of the deceased. He noted several injuries on the head, neck and left hand. Internally, he noted a fracture of **hyoid** bone and collapsed lungs as well as swelling of the brain. He concluded that death was due to asphyxia due to neck, nose and mouth pressure in keeping with manual strangulation. Items recovered from the scene of crime were escorted to Government Analyst for examination.

12. On 28th November, 2014 a psychiatrist at Gilgil Sub-County hospital certified that the Accused was fit to plead. He was therefore presented to court for plea.

13. When placed on his defence, the Accused gave an unsworn statement. To the effect that the deceased was his wife and while she lived and worked in Nakuru, he resided at Gilgil. Without giving dates, he stated that he had travelled, presumably to Nakuru, and waited for the wife to come home from work. He developed pain from ulcers and called **PW7** to drive him to Catholic Hospital Gilgil in the company of deceased. He was treated and went home and took his drugs. He woke up to find himself admitted in hospital. He denied that he killed the deceased.

14. In written submissions, the defence emphasized the fact that the prosecution case is premised on circumstantial evidence.

15. There is no dispute that the Accused and deceased were man and wife or lovers in cohabitation in the material period. That the deceased worked and mostly lived at Nakuru while the Accused lived in Gilgil where the couple rented a two-roomed house. That the Accused had visited the deceased in Nakuru, and that when the deceased came home from work, the Accused called **PW7** to drive him to a hospital in Gilgil. That he was accompanied by the deceased. The cause of death is not in dispute.

16. The court must determine whether, of malice aforethought the Accused person caused the death of the deceased.

17. Although the Accused did not give any date for his last meeting with the deceased, it is clear that the incident described in his testimony is the same one described by **PW7**, which means that it occurred on the night of 5th November 2014. There are other witnesses such as **PW8** who testified that the Accused had visited the school where the deceased taught on the night of 5th November, 2014. The testimony by **PW8** in regard to the events of the said night are confirmed by the school watchman **PW3**. **PW7** was the last person to be with the couple on the night of 5th November 2014, as he dropped them off at the couple's house at Gilgil after midnight.

18. None of the witnesses called by the prosecution actually witnessed the murder of the deceased. Thus, as observed by the defence, the bulk of the prosecution case is premised on circumstantial evidence. In the case of **Kipkering Arap Koskei -Vs- Republic [1949] 16 EACA 135** the Court of Appeal for Eastern Africa observed regarding circumstantial evidence that:

“It follows that the evidence linking the appellant to that offence is circumstantial. We must therefore closely examine the evidence on record, not only as our normal duty as the first appellate court to arrive at our own conclusions, but also to ascertain whether the recorded evidence satisfies the following requirements:-

- i. The circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;**
- ii. Those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;**
- iii. The circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.”**

19. Later in **Simoni Musoke -Vs- Uganda (1958) EA 715** the Court, citing the English decision in **Teper -Vs- Regina [1952] 2 ALLER 480** by stated:

“In order to ascertain whether or not the inculpatory facts put forward by the prosecution are incompatible with the innocence of the appellant and incapable of explanation upon any other reasonable hypothesis than that of guilt, we must also consider a further principle set out in the case of Musoke v. R [1958] EA 715 citing with approval Teper v. R [1952] AL 480, thus:

It is also necessary before drawing the inference of accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference.”

20. The Accused person was admittedly the last person in the company of the deceased on the material night, and in his house. She did not return to her school in Nakuru. Instead, early on the morning of 7th November 2014, her parents **PW2** and **PW6** in the company of their son **PW4** and the Accused's mother **PW5** discovered the body of the deceased lying in bed next to the unconscious Accused in the couple's house at Gilgil. The door to the two-roomed house was locked from inside and had to be forced open to enable the search party to enter the house. The state of the house as captured in the evidence of these witnesses, particularly **PW4** and in police photographs was disarray, with goods strewn all over the house.

21. And though both the Accused and deceased together lay in bed at the time, the deceased's head rested on a pillow (**Exhibit 4 a and b**) which was confirmed to be stained with her own blood. Blood oozed from her nose and mouth. A knife confirmed to be stained with the Accused's blood and a bucket (**Exhibit 1 and 3**) were next to the bed as well as 2 pieces of rope (**Exhibit 2**). It is true that the Accused was also unconscious but the P3 form tendered indicated that the condition resulted from ingestion of an organophosphate (pesticide), and not ulcer drugs as the Accused appeared to suggest in his evidence.

22. The post mortem report reveals several injuries on the deceased, the most significant being on the neck, nose, mouth and the collapse of the lungs, leading to death from asphyxiation. There was evidence according to the post mortem report of manual strangulation hence the fracture to the **hyoid** bone, to upper cervical bones and the collapse of the lungs. Also noted were 'defensive' injuries to the left hand.

23. There being no evidence of the presence of an intruder or a third person in the couple's house, the question therefore is how the deceased sustained such injuries. The injuries were quite evidently not self-inflicted. Apart from the Accused's blood found on the knife recovered from the bucket in the room, there is no evidence that the Accused suffered physical injuries. He was unconscious from ingesting a pesticide. That harm was, in the circumstances of this case self-inflicted. If a third party had inflicted the injuries on the deceased, the Accused ought to have known, and he too would have suffered physical injuries. That is what is more plausible in the normal course of life.

24. The circumstances described by prosecution witnesses strongly point to the Accused as the person who strangled the deceased, possibly after a struggle during which the house was thrown into disarray. This is fortified by the unchallenged evidence by **PW7** regarding the events of the fateful night while the couple was still at the school where the deceased taught. First, the Accused had claimed to be suffering pain due to ulcers hence the call to have **PW7** take him to the Catholic Hospital in Gilgil. However, when **PW7** arrived the deceased's house in the school, the Accused demanded that the deceased accompany him to Gilgil. The deceased according to **PW7** resisted and started to cry.

25. This is what **PW7** stated in his evidence-in-chief:

“We found Wairimu (deceased) lying on a bed. Maina asked her to get up and go. She cried and resisted. Also Maina started crying and when I inquired Wairimu said I leave them, that Maina had ulcers. It was Maina who was the patient. Wairimu got up, wore trousers and black jacket and we went to vehicle. Wairimu joined us later but before that, I sat with Maina waiting. He said that the wife was not working at the school but engaging in sexual affairs. But since I knew them as a couple I did not speak. But he went on to say that she (deceased) had not slept at home the previous weekend and had been dropped to work in the morning in a Prado (vehicle) belonging to Maina's uncle. Then he saw Wairimu coming and said he would tell me more on the next day.”

26. The witness proceeded to state that he drove to the Catholic Hospital Gilgil. And waited as the couple supposedly went in for treatment, returning in 20 minutes, which surprised him and when he expressed surprise, was shown supposed drugs by the Accused. He then drove the couple home whereupon the Accused paid Kshs 2,000/=, promising to call him on the next day to drop the deceased at school.

27. It seems odd that the Accused, having arrived at the deceased's home (at about 730pm per **PW8**) on the same night, was within a matter of hours in such pain that he needed urgent medical attention, and was by 11.00pm calling **PW7** to go take him to hospital. The second oddity is that a person who claimed to be in need of urgent medical attention elected to call **PW7** all the way from Gilgil to Nakuru, rather than take the nearest available transport to the nearest hospital in Nakuru, itself a larger town than Gilgil, and boasting many good medical facilities.

28. The third oddity is the insistence that the deceased accompanies him to the Gilgil hospital at night even though he was the patient and the deceased was due to be on duty on the next day. Finally, upon reaching the hospital in Gilgil, he was gone for only minutes before returning to the taxi and asserting he had been treated, and on being dropped home, giving instructions for the next day. This conduct defies common sense. Yet, on all accounts, the Accused presented as a reasonably intelligent and young man of sound mind of whom one would expect rational conduct.

29. The court could find no reasonable explanation for this peculiar conduct. The Accused's defence did not dwell thereon. The emerging picture from the events of the fateful night reveal the Accused as a man very much in control and orchestrating events around him, rather than a desperately ill patient in need of urgent medical care. Taking the entire prosecution evidence into account, it appears that his alleged ulcer pain was a ruse designed to persuade the deceased to leave the safety of her school accommodation and to accompany the Accused to Gilgil, and eventually to the home at Site. This was achieved not only by pressing the deceased, but also by manipulating her through tears. Even while he and **PW7** waited at the school for the deceased to join them in the taxi, there was an important matter on Accused's mind, and it was not his alleged illness. He took the opportunity to confide in **PW7** the information that, the deceased had been unfaithful to him, and that she had gone out over the previous weekend rather than go home and had been dropped at school in a high end vehicle.

30. That issue, to my mind, was weighing on his mind and was the sole reason for the Accused's trip to Nakuru and the clear feigning of illness. The evident motive of the killing was to punish the deceased for her alleged infidelity. Evidently, the Accused plotted carefully and succeeded in bringing the deceased to the house at Gilgil where after an apparent struggle, he managed to strangle her to death before himself ingesting a pesticide, in an obvious suicide bid.

31. The Accused's defence suggests that he did not know how the deceased met her death. He was the last person to be with the deceased in

the locked room where both were found, one dead, the other unconscious one day later. Section 111 of the Evidence Act provides that:

“(1) When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him:

Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution, whether in cross-examination or otherwise, that such circumstances or facts exist:

Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defense creates a reasonable doubt as to the guilt of the accused person in respect of that offence.”

32. There is uncontroverted medical evidence in the form of the P3 form [**Exhibit 8**] in respect of the Accused that he was hospitalized for treatment after ingesting a poisonous substance, a pesticide and not conventional medicine. Only the Accused was in a position to explain what happened in the period after he and the deceased were dropped home by **PW7** when he and the deceased were alone in the house until the morning of 7th November, 2014.

33. The Accused’s defence is silent on this question the Accused once more feigning a sort of “passing out” allegedly after he took ulcer medication. As observed earlier, while the deceased’s injuries were most probably inflicted by another person, the Accused’s eventual and true falling into unconsciousness resulted most probably from his deliberate ingestion of a pesticide. Why? Because, that was the last scene of the plan he had set to execute right from the moment he decided to lure the deceased to Gilgil from Nakuru. He intended to kill her as punishment for her perceived infidelity and then to take his own life. Unfortunately, the Accused survived the suicide attempt.

34. Malice aforethought is evident from the planning to the execution of the scheme as demonstrated by the prosecution evidence. The Accused’s defence is a farce and has been totally displaced by the prosecution evidence. The defence was deliberately framed to avoid offering an explanation for the state of affairs at the Accused’s house on the morning of 7th November 2014 when **PW2, PW4, PW6** came looking for the deceased including the violent death of his wife/lover. It is incapable of belief and is rejected accordingly.

35. Reviewing all the evidence, I find that the proven facts in this case unerringly point to the Accused as the person who murdered the deceased on the night of 5th November 2014, that the said facts are incompatible with his innocence, and further, that there are no co-existing factors to weaken the inference of guilt. I find the Accused guilty as charged and enter a conviction against him.

Dated and signed at Kiambu, this 27th day of **February, 2019**.

C. MEOLI

JUDGE

Delivered and signed at Naivasha, this 14th day of **March, 2019**

R. MWONGO

JUDGE

In the presence of:-

Mr. Koima for the State

Mr. Achieng Owuor holding brief for Mugambi for the Accused

Accused - David Maina Karoki - present

Court Assistant - Quinter Ogutu