



**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT NAKURU**

**CRIMINAL CASE (MURDER) NO. 88 OF 2014**

**REPUBLIC.....PROSECUTOR**

**-VERSUS-**

**DAVID NJOROGE NJOGU.....RESPONDENT**

**JUDGMENT**

1. David Njoroge Njogu was charged with the offence of murder of one Kennedy Waithigo deceased on the 20<sup>th</sup> August 2014 contrary to **Section 203 as read with Section 204 of the Penal Code** at **Costarica[LO1] Trading Centre** in Rongai District within Nakuru County. He pleaded not guilty.

The prosecution called (8) eight witnesses.

2. To prove the offence of murder, the prosecution must establish by evidence that the offence was committed with malice aforethought – **Section 203**, and that such malice aforethought is established in reference to the circumstances prescribed under **Section 206** of the Penal Code, thus

*(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 ---*

*(c) An intent to commit a felony.*

3. **Doctor Ngulungu, PW6**, who conducted the post mortem on the body of the deceased established the cause of death as cardiac and lung injuries due to stab wound on the left chest by a sharp object in keeping with homicide, and produced his report as PExt 2.

4. **PW1 Lydia Wanjiku Gitundu** wife of the deceased testified that on the fateful day the deceased left their home around 6.30pm and that about 7.00p.m., one Maina Njoroge called her and informed her that her husband had been stabbed at Costarica Centre and upon arrival, found him bleeding profusely with stab wounds the on the left side of his chest and buttocks. With others, it was her testimony that they took him to Nakuru General Hospital where he was admitted but on the following day he died about 1.00p.m. She did not know who had stabbed her husband. She then reported at the police station and recorded her statement.

5. **PW2 Paul Gichengo Wahindi** testified that on the fateful day, he was at Costarica center and saw the deceased and the accused quarreling and upon asking them the reason for the quarrel, the accused told him that the deceased had spilled his milk. He further testified that he separated them but the accused followed the deceased, tripped him, removed a knife from his shirt and stabbed him on the left side of the chest and buttocks after which he staggered and fell down. That on the following day, he heard that the deceased had died at Nakuru general hospital.

6. On cross examination, **PW2** stated that he did not see the spilt milk nor did he report the incident to any authority.

7. **PW3 Jacinta Wanjiru Kairo** testimony was that she was present and saw the deceased and the accused quarrelling. She further testified that she saw the accused stab the deceased on the chest and buttocks, and also helped to place the deceased on a vehicle to be taken to hospital. She knew both as her neighbours.

It was her testimony that the accused was carrying milk in a container and as he passed, the deceased knocked the accused spilling the milk.

She further testified that after stabbing the deceased, the accused left with the knife which was long.

8. **PW4 Jane Wambui Kagai** a vegetable vendor who testified to have been selling vegetables about three meters away saw the deceased and the accused quarrel after the accused milk was accidentally spilled by the deceased. She saw the accused remove a knife and stab the deceased at the chest and buttocks.

9. The area chief **Simon Mwangi testified as PW5** together with others they arrested the accused on the 21<sup>st</sup> August 2014 and took him to Banita police station. Upon cross examination he stated that he did not witness the stabbing nor did he know who stabbed the deceased.

10. The investigating officer **PC Fidelis Mutuku** from Solai police station confirmed having received the deceased who was brought by his wife (**PW1**) and members of the public to the police station after being stabbed upon which he referred them to Nakuru General Hospital for treatment. He did not recover the knife, the alleged murder weapon.

11. In his sworn defence, the accused testified in Kiswahili and denied participating in the murder of the deceased. He testified that the area chief together with a police officer arrested him on the 21<sup>st</sup> August 2014 and took him to the police station where he was shown a sword, a hut and a belt which items he denied being his or knowing them. He however confirmed that he knew **PW4, PW3** and the police officer PC Fidelis, and the area chief. He stated that he had a case with PW3 and PW4 over a cow. He confirmed that PW2 was his workmate at their workplace. He also testified and confirmed that he knew the deceased but not by name and used to see him at the Kamukunji centre. On the fateful day between 6.00p.m. and 6.30p.m. the accused testified that he was at his home with his sisters.

## 12. Issues For Determination

(a) *Whether the prosecution has established the requirements of Section 206 of the Penal Code to prove murder.*

(b) *Whether the offence of murder was proved to the required standard, beyond reasonable doubt against the accused.*

13. Both the prosecution and the defence did not tender any submissions leaving the court to rely on the evidence as adduced before it.

14. **PW2, PW3** and **PW4** testified to have witnessed and saw the accused and the deceased quarrelling over some spilt milk which was accidentally spilt when the deceased knocked the tin of milk the property of the accused.

**PW2** separated the two but the accused followed the deceased, pulled out a long knife and stabbed the deceased at the left chest and buttocks then left with the knife.

15. This evidence was sufficiently corroborated by evidence of **PW3** and **PW4**, who were present at the scene of crime and saw what happened. They knew both the accused and the deceased as neighbours. There can be no question as to the identity of either the accused or the deceased. They knew each of them. The incident happened about 6.30 p.m. It was not dark. Members of the public were present and took the deceased to hospital with his wife (**PW1**).

16. In the case **Okethi Okale & Others –vs- Republic (1965) EA 555**, the court held that

*“in every criminal trial a conviction can only be based on the weight of the actual evidence adduced --- the burden of proof in criminal proceedings is throughout on the prosecution and it is the duty of the trial judge to look at the evidence as a whole.”*

See also **Section 107 (1) (2) Evidence Act, Chapter 80 Laws of Kenya** where it is required of any person who requires any court to give judgment as to any legal right or liability on the existence of facts which he asserts to prove that those facts exist.

17. The prosecution evidence was direct evidence by at least three witnesses who testified to have been present at the scene of crime and saw the events leading to the death of the deceased. The accused in his defence admitted knowing the eye witnesses – **PW2, PW3** and **PW4** save for the deceased though he testified to have been seeing him at the market center.

18. The cause of death was certified by the pathologist **PW6** as cardiac and lung injuries due to stab wounds on the left chest by a sharp object. This is consistent with the eye witnesses evidence that the stab wounds to the chest and lungs were caused by a sharp object stated to have been a knife though the said knife was not recovered, the evidence before the court being that the accused went away with the knife after commission of the offence and was arrested a day after, without the knife.

19. When the accused decided to follow the deceased after **PW3** had separated them, and removed a knife and stabbed the deceased not once but several times to the left chest and buttocks, he was determined and had an intention to cause pain and grievous harm or death to the deceased. A knife is a dangerous weapon and its use is meant to cause grievous harm or death to any person upon whom it is used. It is within the knowledge of anyone using a dangerous weapon that such weapon would cause harm or grievous bodily harm or death.

20. Based on the evidence on record it is my finding that the accused had the intention and knowledge that the use of the knife would cause grievous harm, or death to the deceased but nevertheless used it despite intervention by **PW3**. – See **Nakuru Cr. Case No. 6 of 2011 Republic –vs- Peterson Njuru Githui (2011) e KLR Emukule J.**

21. There is no suspicion that it may have been the accused who murdered the deceased. Eye witnesses testified to have witnessed the events as they unfolded.

So that when the accused testified that he did not participate in the commission of the offence, and put forth an *alibi* defence, he could not have been testifying to the truth.

In the first instance, the accused in his defence testified that between 6.00p.m. – 6.30p.m. on the fateful day he was at home with his sister who stays at Kiambu. He did not call the unnamed sister to testify and confirm as to his *alibi* defence.

22. Further the accused did not cross examine **PW3** and **PW4** to establish if indeed they had a quarrel over a cow prior to the commission of the offence and therefore to establish that the two had a cause to falsely frame him. Even if that could have been so, what about evidence of **PW2** who intervened in the quarrel between the accused and the deceased and separated them? Did he also frame him? I find the evidence of PW2, 3 and 4 truthful and cogent.

23. In light of these very plain clear and direct evidence and circumstances thereto, I have no doubt in my mind that the accused had the intention to cause grievous bodily harm to the deceased that caused his death so exhibited in the manner he stabbed the deceased at the left side of the chest with a sharp knife – **Republic –vs- Ruth Wanjiru Kamande (2018) @ KLR**. I reject the defence evidence as a fabrication.

24. For those reasons, I find that the prosecution has proved its case against the accused beyond any reasonable doubt, the required standard of proof.

Consequently I find the accused guilty as charged and is thus convicted for the offence of murder of the deceased, Kennedy Waithigo on the 20<sup>th</sup> August 2014.

**Dated, signed and delivered this 16<sup>th</sup> Day of May 2019**

**J.N. MULWA**

**JUDGE**

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