



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYERI**

**CRIMINAL CASE NO. 20 OF 2012**

**REPUBLIC**

**VERSUS**

**PATRICK NJERU KAMWARA.....ACCUSED**

**JUDGMENT**

The accused was charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code the particulars being that on the 8<sup>th</sup> day of May, 2012, at Mairo-ini- A trading centre of Chinga South East location in Nyeri South District within Nyeri County, he murdered John Mugendi Gatithi. He entered a plea of not guilty.

In a bid to prove its case against the accused, the state marshalled twelve witnesses who testified on its behalf. The first of these witnesses was Joseph Mwangi Wangari (PW1) whose evidence was to the effect that on 8 May 2012, at about 6.00 PM he was at Furaha bar in Mairo-ini "A" when he noticed the deceased and the accused, who were in the same bar, quarrelling. Apparently the two moved out and soon thereafter, a jacket belonging to the accused was thrown inside the bar. The accused and the deceased then physically confronted each other but Mwangi managed to separate them after which they went separate ways. He gave the accused his jacket and went back to the bar. However, after about 10 minutes he heard people screaming. When he moved towards the direction of the screams, he noticed the deceased's body on the ground; it had stab wound and was about 100 metres from the bar. Meanwhile, the accused was nowhere to be seen.

The owner of the bar in which the accused was drinking was one Jackson Mundia Wachira (PW4) who testified that on 8 May 2012 at about 6 PM, the accused entered the bar looking for an air time card; he was soon followed by the deceased who was drunk. The two started quarrelling and at this juncture, he asked them to go out. They went to the veranda and continued quarrelling. A jacket which the accused had been wearing was thrown into the bar. He later learned that the deceased had been stabbed and died.

Lawrence Mutegi Njeru (PW11) testified that he was familiar with the accused and the deceased; he knew the accused because they both used to pick tea together at Chinga while the deceased was employed by Njeru's employer's neighbour. As a matter of fact, he had been with the deceased in the morning of 8 May 2012. On the same day in the evening, he met the accused and the deceased quarrelling. Initially he couldn't identify the accused from far but he recognised him as soon as he moved closer to them. He then saw the deceased fall on his back and the accused run away. At that time, he was about 20 metres from where the accused and the deceased had been standing. When he moved closer to the deceased's body, he noticed that he had sustained a stab wound on left side of the abdomen. He tried calling him but he could not respond. He picked the deceased's phone and some receipts and went to his place of work leaving a crowd of people at the scene; he later returned to find police officers whom he provided with information concerning the identity of the accused and the deceased. On the following day, he handed over the receipts and the phone to the deceased's employer. He recalled that on the material day, the accused was wearing a red cap and a grey shirt which he identified in court. He saw him holding a jacket in his hands. The deceased, according to him, had a t-shirt and a black trouser.

The deceased's employer, Priscilla Muthoni Wambugu (PW3) testified that on 8 May 2012 at about 7.30 PM she was called by the police and informed that the deceased had died. She went to the scene where she arrived at about 8.30 PM and indeed found the deceased's body on the road. It was about 100 metres from the nearby shops. Apart from the police, there were members of the public at the scene. The deceased had been stabbed on the lower side of the stomach. She confirmed that the accused was an employee of her brother-in-law and from her evidence, they lived in the same neighbourhood because she testified that the body was about 200 metres from her brother-in-law's place but about 600 metres from her home.

Police constable Shagari Maundu PW7 testified he was stationed at Chinga police station at the material time and that on the date in issue, he was informed by the officer in charge of the station that the chief of Chinga East location had informed him of a body lying at a roadside at Mairo-ini- "B" trading center. He was instructed to accompany other police officers to the scene. These officers were corporal Oyalo, police constables Mumo, Faith and Mwakio. Upon arrival at the scene, they found the deceased's body on the road; according to Maundu, the body had visible injuries on the chin and a stab wound on the abdomen.

The officers were informed of what transpired between the accused and the deceased. They were further informed that the accused had proceeded towards Kiriaini direction and indeed the signal from his phone was traced to that region. With this information corporal Oyalo and police constable Mumo proceeded to Kiriaini town to trace the accused while other officers remained at the scene to guard it. Corporal Oyalo managed to arrest the accused at Kiriaini and returned with him to the scene. He took possession of his shirt which was stained with blood. The accused led the officers to Mairo-ini- "A" where he had hidden the murder weapon. There they recovered a black sword with a holster hidden in a nappier grass bush; both were also blood-stained. An inventory of the recoveries was made which both the officers and the accused signed the inventory.

The officer testified that the bar in which the deceased and the accused picked their quarrel was in Mairo-ini- "A" but that the accused's home was in Mairo-ini-"B". The two places are about 1 KM apart. He was led there together with the rest of the police officers by members of the public but they did not find anybody there.

Police Inspector John Mugo (PW10), the scenes of crime officer testified that he took photographs of the deceased's body at the scene of crime. Apart from the photographs of the deceased, the officer also confirmed that he took the photographs of the scene where the murder weapon and its sheath were hidden.

A government chemist, Ann Wangeci Nderitu (PW2) testified that she received some items from police constable Obiero for examination and to determine the source of the blood stains on them. These were a knife, sheath, the accused's shirt and blood samples of both the deceased and the accused. She established that the shirt was moderately stained with human blood while the knife and the sheath were highly stained with human blood. The blood sample from the sheath did not generate a DNA profile; she was, however, able to generate a DNA profile from the knife, the shirt and the blood samples from the accused and the deceased. She concluded that the blood sample of the deceased was of similar DNA as the blood sample on the accused's shirt.

The deceased's father Leonard Gatiri Nyaga (PW5) confirmed having identified the body of his son for post-mortem exercise. His brother-in-law John Kinyua Njiru (PW6) also testified as having identified the body for the same purpose.

The post-mortem itself was conducted by Dr Njuki whose report was produced in court by Dr. Kimathi Paul. He confirmed in his evidence that the post-mortem was conducted on the body of John Mugendi Gathiti on 14 May 2012 at Mukurweini District Hospital. He confirmed the body was of a male African of about 35 years of age. It was clothed in black jeans and T-shirt. He observed that the body had a stab wound on the upper jaw, a bruise on the chest and a stab wound on the left lumbar region. There was also bruising on the internal chest wall. The small intestines were protruding from the stab wound. There was excessive blood in the abdomen. In the doctor's opinion, the deceased died of penetrating abdominal injury with massive bleeding.

The investigations officer corporal Patrick Oyalo (PW12) who was then attached to the DCIO's office at Nyeri South testified that on 8 May 2012 he was called by the then District Criminal Investigations Officer Chief Inspector of Police Stephen Mutua who told him that there was an incident of murder at Mairo-ini- "A". He proceeded to the scene together with police constable Benjamin Mumo and the driver police constable Paul Gachara. When they arrived, they found a crowd of people at the scene. There were other police officers who had arrived earlier; these were the Officer in charge of Chinga police station, Chief Inspector of police Henry Kimathi and police constable Zachary Mandu. The body of the deceased was lying beside the road. It is at the scene that he came to learn both the deceased's and the accused's name. He established that both worked in nearby homesteads. Corporal Oyalo called for the services of the scenes of crime officer, corporal John Mugo, who took photographs of the scene before the body was removed to the mortuary. He gathered from the owner of the bar where the accused and the deceased had been that the two started quarrelling in the bar and that he even intervened and asked them to leave his bar. It is after they left the bar that he was informed that the deceased had been stabbed. He also established that after the deceased and the accused left the bar, the accused removed his jacket and threw it in the bar ready to duel with the deceased.

When the investigating officer made inquiries on whether any of the persons present had the accused's contact, one of the members of the public volunteered and gave the number to an officer of the crime intelligence unit. The number was then traced to the outskirts of Kiriaini town. The investigations officer suspected that the accused was possibly on the run and therefore he pursued him while in the company of two members of the public who could identify him. They went to Kiriaini town but they could not trace the accused. However, at about 9 PM, while at a road junction connecting Murang'a, Kangema and Othaya Roads, the accused emerged and approached the officers. He was immediately identified by the two people whom the officers had come along with. The investigations officer stopped him and asked him whether he was Patrick Njeru. He answered in the affirmative and at that point he was arrested. He searched the accused but did not find anything on his person. Upon interrogation, he admitted he stabbed the deceased with a knife because the deceased insisted that he, the accused should buy him beer yet he did not drink. He also admitted that he had hidden the knife in a nappier grass plantation and that he was ready to show it to the police officers. The officer noticed that his grey shirt had blood stains. He asked him to remove the shirt and hand it over to the officer. They then went back to the scene and found the District Criminal Investigations Officer Stephen Mutua and the officer commanding police division had arrived at the scene. They divided themselves into teams; one team proceeded to the scene where the murder weapon had been hidden while the other team took the body to the mortuary.

The accused led the officers to Mairo-ini-"B" where he showed them where he had hidden the knife. The scenes of crimes officer took photographs of the knife and its holster. The investigations officer went back to the scene of the murder the following day and drew a sketch plan of the scene. He also interviewed several people including the owner of the bar and Lawrence Njeru who also witnessed the altercation between the accused and the deceased. Based on the information he received he was satisfied that the accused was the person who murdered the deceased.

The investigations officer prepared an inventory which was signed by the accused. He also prepared an exhibit memo for the deceased's and the accused's blood to ascertain whether the blood on the accused person's shirt was the same blood as that of the deceased. He also attended the post-mortem of the deceased.

That is all there was as far as evidence is concerned.

The offence of murder is defined in **section 203** of the **Penal Code**, cap.63 which is one of the sections under which the accused was charged; that sections 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.***

Until the Supreme Court decision in **Petition No. 15 of 2015 Francis Karioko Muruatetu & Another versus Republic (2017) eKLR**) the punishment for the offence of murder was prescribed in Section 204 of the Penal Code but this section has since been declared to be contrary to the Constitution to the extent that it prescribes death as a mandatory sentence. It follows that although the accused was charged under this provision of the law as well, it is of little consequence.

As far as section 203 of the Penal Code is concerned, the offence of murder is proved and the trial court is bound to convict if it is satisfied that indeed a person died; that the death was as a result of an act or omission of another person; that the act or omission was unlawful; and that the person who did the unlawful act or omitted to act had malice aforethought. The burden of proving all these elements lies squarely on the shoulders of the prosecution. On its part, the court has the task examining the evidence in light of the threshold set forth by this provision of the law and determine, in particular, whether it satisfactorily supports each of these elements.

There does not seem to be much dispute about the fact of death a person named John Mugendi Gatithi. Most, if not all, of the prosecution witnesses have led uncontroverted evidence of the death of Gathiti but of particular relevance is the evidence of the pathologist Dr Kimathi (PW8); he produced a post-mortem report showing that the body which was the subject of the post-mortem was that of the deceased. This body was positively identified by the deceased's father Leonard Gatiri Nyaga (PW5) and his brother-in-law John Kinyua Njiru (PW6). He confirmed that the deceased died and opined that he died as a result of penetrating injury with massive bleeding.

As to whether the death was caused by an act of another person, again the pathologist testified that the deceased sustained bodily injuries which, in my humble observation, would demonstrate that he was a victim of some violence orchestrated by some other person. According to the pathologist, the deceased sustained a stab wound on mandible area and in particular on the upper jaw and a bruising on the chest. He had stab wound on the left lumbar region that was so deep that the small intestines were coming out. The nature and extent of these injuries prove two things; that they were not self-inflicted but caused by someone else and also, that they were unlawfully caused. There was no evidence that the assailant, in so attacking the deceased, was either acting in self-defence or for some other lawful reason.

The next issue of concern is whether there is sufficient evidence to support the prosecution case that the accused is the person who inflicted the fatal injuries.

To begin with, none of the witnesses testified as having seen the accused or any other person attack the deceased; the entire prosecution evidence on this question was indirect or circumstantial. This sort of evidence has been referred to in section 164 of the Evidence Act cap. 80. It states as follows:

### **164. Circumstantial questions to confirm evidence**

***When a witness the truthfulness of whose evidence it is intended to confirm gives evidence of any fact, he may be questioned as to any other circumstances which he observed at or near the time or place at which the fact occurred, if the court is of opinion that such circumstances, if proved, would tend to confirm the testimony of the witness as to the fact to which he testifies.***

I understand this provision to mean that where there is proof of circumstances that tend to confirm the evidence of a witness as to the existence of a particular fact, the court may rely on such evidence of circumstances that may have been observed at or near the time or place the fact in issue occurred. In the absence of direct evidence, a trial court may convict on such evidence if it is satisfied that the circumstances that constitute it have been proved beyond reasonable doubt; however, circumstantial evidence must be narrowly examined before drawing any inference of guilt on the part of the accused. The court must be satisfied that the circumstances are such that no other inference can be drawn from them other than that of guilt of the accused person. The leading decisions on this question are **Republic versus Kipkering Arap Koske & Another (1949) XVI EACA 135** and **Simon Musoke versus Republic (1958) EA 715**.

In **Republic versus Kipkering Arap Koske & Another**, the Court of Appeal for Eastern Africa, quoting Wills on **Circumstantial Evidence**, 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**, this principle was extended when the same court cited with approval a passage from the decision of the Privy Council in **Teper versus Republic (1952) AC 480** where it was held at page 489 that: -

***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.***

Turning back to the case against the accused, there is ample and consistent evidence that the deceased and the accused were together on the material day; there is also evidence that there was some altercation between them which spiralled into a physical confrontation. Joseph Mwangi Wangari (PW1) was able to separate them and apparently each one of them went separate ways but soon after that, the deceased was

stabbed to death. According to this witness, it was only after about ten minutes that he heard people screaming and when he ventured out of the bar from which he was drinking and, from where the quarrel started, that he found the deceased's body sprawled on the road, just about 25 metres from the bar.

Just like other witnesses who saw the accused and the deceased quarrel, Lawrence Mutegi Njeru (PW11) also witnessed the altercation between the two; the only difference between his testimony and the rest of the previous witnesses is that he witnessed the deceased and the accused quarrel at the same spot where the deceased's body was found. As a matter of fact, he could probably have been the appropriate eye witness of the deceased's murder save for the fact that all he saw was the deceased fall down in the presence of the accused; what he did not see was the fatal blow from which the deceased succumbed. But there is one further thing he saw that, in my view, is crucial to the whole gambit of circumstantial evidence which is that he saw the accused holding a jacket. This is the same jacket that the accused had earlier stripped and thrown into the bar as he steadied himself to duel the deceased.

Although the accused lived in the same neighbourhood with the deceased he could not be traced after the murder; efforts to trace him at the home where he worked and lived also proved fruitless. He fled after the murder and it took the efforts of the investigations officer to track him down at Kiriaini town where his phone was located using the Global Positioning Tracking System.

When he was found, he not only admitted to having stabbed the deceased and led the police officers to where he had hidden the murder weapon but also his shirt had traces of blood which was established to be of the same group as the deceased's.

All this evidence would, in my humble view, constitute inculpatory facts.

The accused's evidence that he was still looking for a shop to buy airtime between 6PM when the deceased was murdered and 11 PM when he was nabbed, miles away from his home appeals to me to be hollow. Again, his evidence that he was forced to sleep next to the vehicle which carried the deceased is also not supported by evidence. What I gathered from the testimony of the investigations officer was that he took possession of the accused's shirt immediately he was arrested and, in any event, the deceased's body was taken to the mortuary as he and his colleagues together with the accused proceeded to the scene where he had hidden the murder weapon. This evidence was not challenged during cross-examination and even if it had been, it would not have been displaced because from the facts, there is no possibility that the accused ever came into contact with the deceased after the latter's murder. The allegation that the accused may have been forced to come into contact with the deceased is, at best, an afterthought.

It follows that when one looks at what constitutes circumstantial evidence against the appellant, it is possible to conclude, as I so hold, that it is sufficient to not only place the accused at the scene of crime at the time the crime was committed but also it points to the accused as the person who fatally stabbed the deceased.

The inculpatory facts, in my opinion, are incompatible with the innocence of the accused or otherwise incapable of explanation upon any other reasonable hypothesis than that of the accused's guilt. I have not been able to find any evidence of what would constitute co-existing circumstances that can be said to weaken or destroy the inference of guilt on the part of the accused.

I am therefore satisfied that the prosecution has proved, beyond all reasonable doubt, that the accused murdered the deceased.

The last question for disposal is the motive behind the murder; as noted, proof of malice aforethought in an offence of murder is just as crucial as proving the fact of the death and that it was unlawfully caused by the act or omission of another person. Malice aforethought is the mental element or the mens rea in an offence of murder; it may be 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**) but 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**).

**Section 206** of the **Penal Code** 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.**

The accused stabbed the deceased against the background of some quarrel between them; it is possible that he may have been infuriated by what the deceased may have done or said before he resorted to the most savage act of killing him. Whatever motivated him, the nature and the extent of the wound he inflicted on the deceased goes to show that he either intended to kill the deceased unlawfully or he had the mission to cause him grievous bodily harm. Either way, the prosecution has proved beyond reasonable doubt that the accused had malice

aforethought.

In the final result I find the accused guilty of murder as charged and I hereby convict him accordingly.

**Dated, signed and delivered in open court this 7<sup>th</sup> day of June, 2019**

Ngaah Jairus

**JUDGE**