



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYERI**

**CRIMINAL CASE NO. 18 OF 2013**

**REPUBLIC**

**VERSUS**

**GRACE WANJIRU GATHUMBI.....ACCUSED**

**JUDGMENT**

1. The accused was charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code; she is accused of having murdered Rosemary Wangechi Ndaiga between the 3<sup>rd</sup> and 4<sup>th</sup> September, 2008 at Solio Estate within Narumoru Location Kieni East Sub-County within Nyeri County; the accused had a mental assessment test conducted and the report was produced and marked as 'PEXh.17' and she was found fit to plead and to stand trial; upon taking plea the accused pleaded not guilty to the charge;
2. At the hearing hereof the accused was represented by Learned Counsel Mr. Ombongi whereas Ms. Gicheha was the Prosecuting Counsel for the State; the prosecution called a total of eleven (11) witnesses in furtherance of its case; the accused was found to have a case to answer and was placed on her defence and she opted to give a sworn statement in defence; at the close of the proceedings both counsel made final submissions; hereunder are the rival submissions;

**THE PROSECUTION'S CASE**

3. Ms Gicheha for the state submitted that the prosecution had proved its case beyond reasonable doubt. The evidence point to the accused having murdered the deceased. There was a confession in which the accused narrated how she carried out the heinous act.
4. The confession is buttressed by testimony of witnesses such as PW7, a taxi driver, who stated that he carried the deceased and the accused to the deceased's place before the deceased disappeared. PW2 corroborated this evidence by that she left the accused and the deceased together after school. PW4 confirmed that he indeed had an intimate relationship with the accused and was close with the deceased. This established *mens rea* for committing the offence.
5. In 2008 the accused was found guilty and convicted to five (5) years imprisonment for the offence of kidnapping the deceased. The body of the deceased was found in shallow grave in the accused's house. The accused denied living at that place. However on cross-examination she said that she could not recognize bystanders because they were not residents of Solio. The school uniforms found on the body were confirmed to be those of Narumoru Secondary where the deceased went to school. The findings of the government chemists were well explained as to why no results were yielded.
6. The prosecution urged the court to find the accused guilty with the offence of murder and sentence her accordingly.

**THE DEFENCE'S CASE**

7. Mr Mugo holding brief for Mr. Ombongi for the defence submitted that there were inconsistencies in the testimony of the prosecution witnesses. According to the government analyst the exhumed remains could not be identified as belonging to the deceased. Further the prosecution only relied on alleged love triangle involving the accused, deceased and one James Kariuki Githaiga. This was not proved with any evidence.
8. The land on which the remains were exhumed did not belong to the accused and the prosecution did not bring evidence of ownership of the said property. There was a grudge between the deceased and her sister for failure to repay a loan and that is why she testified against the accused. The rope and the sack discovered at the crime scene were not linked to the accused.
9. Counsel urged the court to set the accused at liberty considering the anomalies in the evidence together with the cogency of the defence.

## ISSUES FOR DETERMINATION

10. After the full hearing of the case and the hearing the rival final submissions of both prosecuting and defence counsel this court has framed the following issues for determination;

- (i) Fact of death; the death of the deceased and the cause of death;
- (ii) Whether the accused caused the death of the deceased by either an unlawful act or omission;
- (iii) Whether the accused in causing the death had malice aforethought;

## ANALYSIS

11. The offence of murder is set out in Section 203 of the Penal Code and reads as follows;

***“Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.”***

12. In a charge for murder the prosecution has to prove three ingredients of the offence; it must prove the fact of death and the cause of death; it must also prove that the accused caused the unlawful act or omission that caused the death; and lastly it must prove the accused had the intention to cause death;

13. There was no eye witness to the murder incident and therefore the prosecution’s case rested principally on the confessionary statement (**‘PEXh.4’**) dated the 23<sup>rd</sup> August, 2013 recorded by CIP (as he then was) Stephen Mutua (**PW7**);

14. Although the accused retracted her confession this court conducted a trial within a trial to test its voluntariness and upon being satisfied that there was no evidence of coercion or promise made to the accused by the police this court rejected the objection raised and having found that it had been made voluntarily, proceeded to have it admitted;

15. However, for the prosecution to rely on this confession to establish the accused’s guilt there will be need for circumstantial evidence to corroborate and validate the truthfulness of the facts admitted; on the use of repudiated or retracted confessions this court makes reference to the following dictum in the celebrated case of **Tuwamoi vs Uganda [1967] EA 91** where it was stated that;

***“We would summarise the position thus– a trial court should accept any confession which has been retracted or repudiated or both retracted and repudiated with caution, and must before founding a conviction on such a confession be fully satisfied in all the circumstances of the case that confession is true. The same standard of proof is required in all cases and usually a Court will only act on the confession if corroborated in some material particular by independent evidence accepted by the Court. But corroboration is not necessary in law and the court may act on a confession alone if it is fully satisfied after considering all the material points and surrounding circumstances that the confession cannot but be true”.***

### **Fact of death; the death of the deceased and the cause of death;**

16. **On the fact and cause of death;** The body of Rosemary Wangechi Ndaiga (deceased) was exhumed pursuant to a court order dated the 20/08/2013 and it was identified to Dr Obiero Okoth (**PW5**) at Nyeri PGH by Peter Ndaiga Kabage (**PW1**) the father of the deceased; **PW5** conducted the postmortem on the body of the deceased and he prepared the postmortem report; the evidence on the cause and fact of death of the deceased was contained in the medical evidence of **PW5** contained in the Postmortem Report in which he indicated that a tight ligature was found on the neck and also on the wrist joints; and he established that the cause of death was due to asphyxia secondary to ligature strangulation and smothering; the report was admitted into evidence and was marked as **‘PEXh1.’**

17. This court is satisfied that this ingredient was proved by the prosecution.

### **Whether the accused caused the death of the deceased by either an unlawful act or omission;**

18. In analyzing this issue this court has broken it up into three (3) parts; who was last seen with the deceased; the scene of crime; and the unlawful act

19. **Starting with the question whether the accused was last person seen with the deceased;** during the trial, the deceased’s’ father’s (**PW1**) testimony was that by 6.00pm on the 3/09/2008 he noticed that the deceased had not returned home from school which he said was unusual; the following day he made enquiries at the school on her whereabouts; **PW2** was called by the school principal (**PW3**) and she narrated all that had transpired the previous day and that she had left the deceased in the company of the accused; **PW1** then proceeded to file a report at Narumoru Police Station on his missing daughter; he was later informed by a young man named Chege who knew the accused very well and he confirmed having seen the accused at the shop near the stadium where she had bought the deceased a soda and a cake; when the accused was arrested this young man identified her at an identification parade;

20. Lydia Gathoni (**PW2**), was a friend and a schoolmate of the deceased, her evidence was that they were both Form 3 students at Narumoru Mixed Secondary School; that on the 3/09/2008 they had both left school at about 5.00pm when they met the accused near the stadium; the accused had stated that she wanted to pass some message to the deceased; they moved to a nearby shop where the accused bought the deceased a soda and a cake; **PW2** then left them together and headed to her home; after the accused was arrested she confirmed having identified the accused at an identification parade;

21. **PW8** a taxi driver told the court that the accused was his frequent customer and that on the 3/09/2008 she had called him and requested him to pick her up from the stadium; he found her with a school girl in school uniform; he described the uniform the girl was wearing as a maroon sweater and a white blouse and white socks; his evidence was that he dropped them off at the accused's place which was about one kilometer away;

22. The accused confessed that the school girl and herself were driven to her house by **PW8** and they arrived there at 5.30pm; the evidence of **PW2** provides the timelines of the meeting up with the accused and the deceased near the stadium and that it had occurred between the times 5.00pm to 5.30pm;

23. The evidence of **PW2** coupled with that of **PW8** who picked the two near the stadium and ferried them to the accused's house establishes the circumstantial evidence of access that the accused had to the school girl; and this evidence corroborates and buttresses the facts in the accused statement of confession where she mentions the presence of another student at the meeting on the 3/09/2008; and she also stated therein that after tricking the deceased that;

***“She agreed to accompany me and the other lady left for home.”***

24. When the school girl was ferried to the accused's house she was never seen again; from the circumstances of the case despite having been with the schoolgirl, the accused, when called upon to defend herself, it was noted that her sworn statement of defence was silent as to when she last saw the deceased alive;

25. The accused was also convicted for kidnapping the deceased and was sentenced to serve a term of five (5) years imprisonment in **CMCRC No. 2163 of 2008**; this conviction is admissible and sufficient evidence to prove the fact that the accused had taken and kept custody of the deceased without the consent of the parents;

26. This court is satisfied that there is overwhelming evidence established by the prosecution that proves that the accused was the last person seen with the deceased on the material date;

27. **Connecting the accused to the scene of crime;** according to the prosecution evidence the scene of crime was at a demolished house at Solio Huruma Estate; but it did not produce any evidence of ownership; but this notwithstanding all it needed to establish was that the accused had resided there at the time the offence was committed;

28. In addressing this issue this court first took into consideration the accused statement of confession and then the corroborative prosecution evidence;

29. The accused in her statement mentions the house at Solio, Huruma and she stated as follows;

***“I greeted them and one of them introduced herself as Wangeci. I told her that Wanjau who was her brother and an employee to my boyfriend had sent me to her. I further lied to her that wanjau wanted her to collect his property from my house at Solio, Huruma. She agreed to accompany me and the other lady left for home.”***

30. Interestingly, the accused in her sworn statement of defence denied any knowledge of the area and denied ever having lived there; but during cross-examination this court noted the observation made by the accused about the bystanders who had milled around at the exhumation process; she stated;

***“When taken to the field I was told to point. There was a big crowd. Those people were not from that place-not resident there.”***

31. The accused offered no explanation as to how she arrived at this observation that the bystanders were not residents of the area; in the absence of any explanation this evidence becomes relevant and of highly probative value; firstly, it negates her denial of having any knowledge of the area; and secondly it adds considerable value to the circumstantial connection of the accused to the crime scene when considered in the light of the evidence of **PW1, PW4** and the physical evidence in the form of exhibits produced by **PW10**;

32. **PW1** in his evidence stated that on the 23/08/2013 he was summoned by the police to attend an exhumation process that took place at a demolished house in Huruma Estate in Narumoru; under cross-examination he confirmed that this was his second visit to the place; the first had been during the kidnapping case when he had gone there in search of his missing daughter; but at that time the house had not been demolished; his evidence was that the accused resided there when he visited and this evidence was not challenged or controverted during his cross-examination;

33. James Kariuki (**PW4**) testified that he was the accused's boyfriend and had a romantic relationship with her between 2007 and 2008; and he confirmed that the accused's house was in Solio; and his evidence on her residence was also unchallenged and uncontroverted;

34. The evidence of **PW10** who was the Investigating Officer was that on the 19/08/2013 he received information that a school girl who had been abducted had been murdered and buried in a house in that estate; upon checking the police records he verified there was indeed such a case and that the accused had been charged with kidnapping of a girl and was serving a five (5) year sentence at Kingongo Prison and that she was set to be released from prison;

35. When the accused was released from prison **PW10** was there waiting for her and he arrested her at the prison gates; he stated that in the company of the accused, Mr Emase (the Officer in Charge of Station) and **PW5** and armed with an Exhumation Order (**'PExh.6'**) they proceeded to the crime scene in Narumoru; they found that the house had been demolished and all that was left was a cemented floor;

36. **PW10** testified that the ground was dug up at the demolished house and a complete skeleton was recovered; it had been tied up in a sack together with the deceased girl's school uniform; he produced the school uniform as evidence and the items were marked as follows;

**'PEXh.8' –Maroon sweater**

**'PEXh.9' –Maroon skirt**

**'PEXh.10' – White blouse**

**'PEXh.11' – Gunny bag**

**'PEXh.12' –White socks**

**'PEXh.13' - Mervin**

**'PEXh.14' – Black and white vest**

**'PEXh.15' –Manilla string**

**'PEXh.16' – Cloth-found in the mouth**

37. The principal of Narumoru Mixed Secondary School (**PW3**) confirmed that a girl had disappeared from the school and the parents came enquiring as to her whereabouts; and that he had summoned **PW2** and questioned her of the friend's whereabouts; he testified that the girls dress code at the school consisted of a maroon sweater, maroon skirt, white blouse, white socks, maroon tie with stripes and low heeled black shoes;

38. The taxi driver (**PW8**) also gave a description of the uniform of the school girl who had accompanied the accused when he had picked the two and dropped them off at the accused's house;

39. **PW6** who was a gazetted scenes of crime police officer, corroborated the evidence of **PW10** that the exhumation process took place at Huruma Estate in Narumoru; he took pictures of the exhumation process and produced the same as **'PEXh.2'**;

40. The above evidence both circumstantial and physical provided by the forgoing prosecution witnesses points exclusively to the accused as the only person who could have placed the body and clothing at the house at Solio, Huruma;

41. The confession removes any reasonable doubt as to any other person being responsible for placing the body and the clothing at the Solio house;

42. Finally, there is the question of **the unlawful act** that caused the deceased's death; what emerges from the confessionary statement of the accused is that her intention was to keep the young school girl in the house and let her go at night without anyone noticing; but the girl started screaming for help and this enraged the accused; who then took a sisal rope and strangled her so as to silence her; upon realizing that she was dead she bundled the body into two sacks and buried them in one of the rooms in the house;

43. The evidence of **PW5** was that the body when exhumed was found with a tight ligature around the neck and wrist joints; he made a finding that the cause of death was ligature strangulation and produced **'PEXh.1'** in support;

44. This evidence together with the physical evidence of **PW10** on the recovery of the skeletal body, the sack and the school uniform at the cemented scene corroborates and validates the truthfulness of the confession;

45. The prosecution relied on the confession and the circumstantial evidence as to what actually transpired before and up to the moment of the killing; the circumstances of this case are that the deceased met up with the accused and this established by **PW2**; **PW8** then dropped the two at the accused's house; he described the school uniform the girl was wearing; the deceased was never seen again; the evidence of **PW10** was on the school uniform recovered with the body at the cemented crime scene where at one time the accused resided; the type of school uniform matched the one worn by the deceased when last seen; and evidence on the school uniform was corroborated by the evidence of **PW3** and **PW8**;

46. This court is satisfied that when all the circumstantial evidence is considered cumulatively it forms a chain of events so strong and complete; that the inculpatory facts are found to be incompatible with the innocence of the accused and that there are no co-existing circumstances found to weaken the chain of circumstances relied upon by the prosecution;

47. The circumstantial evidence and the physical evidence are found to be strong and reliable and corroborate the accused's confession; and assists this court in drawing only one logical inference and conclusion that the accused planned and committed the unlawful act that led to the death of the deceased;

**Whether the accused in causing the death had malice aforethought;**

48. Malice aforethought is an essential ingredient of a charge for murder; in this instance the prosecution witnesses adduced evidence on both motive and malice aforethought;

49. The motive in this instance can be deduced from the evidence of **PW4**; he stated that he had a romantic relationship with the accused; and when their relationship was going through a difficult patch he got close to the deceased; the times she came by the carwash to visit her brother he would escort her home; motive was also mentioned in the accused's confessionary statement whereby she acknowledges the relationship she had with **PW4** and that when it hit rock bottom her assumption was that this was due to and caused by the deceased's presence; that is why she confessed to having tricked and abducted the deceased so as question her on the relationship she might have had with **PW4**;

50. Besides the prosecution providing evidence on motive there was also sufficient evidence adduced by the prosecution to establish malice aforethought;

51. The definition of malice aforethought is found at Section 206 of the Penal Code which reads as follows;

***“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 death or grievous harm to some person whether that person is actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is cause or not, or by a wish it may not be caused***
- c) ***An intention to commit a felony and***
- d) ***An intention by the act or omission to facilitate the flight or escape from custody of any person who committed or attempted to commit a felony”***

52. According to the above section malice aforethought is deemed to be established by evidence which proves an intention to cause death of or to do grievous harm to any person, whether that person is actually killed or not; in this instance the conduct of the accused in blindfolding the deceased and tying her hands to her back and then placing the sisal rope tightly around her neck and then strangling her establishes an intention to cause death and or to do grievous harm; the injuries inflicted caused the death of the young innocent girl and this is corroborated by the medical evidence of **PW5** who established that the cause of death was due to asphyxia secondary to ligature strangulation;

53. This court is satisfied that the nature of the injuries inflicted by the tightening and use of the sisal rope proved an intention to cause death; and that malice aforethought was established.

54. After taking into consideration the accused's statement of defence in which she contends that the prosecution witnesses, that is **PW1**, **PW4**, **PW8** and her sister were people she was doing business with and were all propelled to testify against her due to grudges, this court finds this line of defence to be an afterthought as she did not cross-examine any of these witnesses when given an opportunity, on the existence of the alleged grudges; this court finds that the statement of defence is displaced in totality by the prosecution evidence.

55. In conclusion, this court is satisfied that the circumstantial evidence collaborates and validates the truthfulness of the facts admitted in the confessionary statement.

#### **FINDINGS AND DETERMINATION**

56. For the forgoing reasons this court makes the following findings and determination;

- (i) This court finds that the prosecution proved the fact and the cause of death;
- (ii) The court finds that the unlawful act that led to the death of the deceased was committed by the accused;
- (iii) This court finds that malice aforethought was established;
- (iv) The prosecution is found to have proved its case against the accused to the desired threshold;

57. The accused **GRACE WANJIRU GATHUMBI** is hereby found guilty of murder contrary to Section 203 as read with Section 204 of the Penal Code and is accordingly convicted under the provisions of Section 215 of the Criminal Procedure Code.

Orders Accordingly.

**Dated, Signed and Delivered at Nyeri this 18<sup>th</sup> day of July, 2019.**

**HON.A.MSHILA**

**JUDGE**