



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NYERI**

**CRIMINAL CASE NO. 61 OF 2009**

**REPUBLIC**

**VERSUS**

**1. JOSEPH MWIHURI KARIUKI alias KIGUTU**

**2. AUGUSTINE GITHINJI KARIUKI**

**JUDGMENT**

The accused persons were charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code, cap.63. The particulars were that on the 14<sup>th</sup> day of December 2009 at Muthinga village in the then Nyeri District of Central Province with others not before court they murdered Joseph Waigwa Nduru. They entered a plea of not guilty.

Of all the witnesses that testified on behalf of the state, none of them witnessed the murder; going by the testimony of these witnesses, the prosecution case was based either on what the state thought was a dying declaration or circumstantial evidence.

One of these witnesses was the deceased's wife, Esther Wambaire (PW1). Her evidence was that on 14 December 2009 at about 11 PM she called her husband on phone to enquire whether he was still coming home. She assumed that he may have been in a bar drinking because she heard a cacophony of voices in the background at his end of the line. He told her that he would be coming home. After about an hour, she heard a loud bang and someone scream and soon thereafter she heard someone walk outside the house. She called out her husband's name. He responded and told her that he had been beaten; according to her, he was breathing with difficulties. When she opened the door and lit the lamp, she noticed that the deceased's clothes were soaked in blood. He told her that he had been attacked by one Kaguta whom, according to her, was the first accused's nickname. He asked her not to close the door as he wanted to go to the police and report that his phone had been stolen. She screamed for help; her brother-in-law, Josephat Ndumia, responded and came followed by her son Paul Ndegwa. They took the deceased to Kinungi health centre for treatment.

While at the health centre three drunk men came there; she knew them as her neighbours and one of them, whom she identified as Mbau told her that he had bought alcohol for the deceased. She suspected them to have murdered the deceased because they appeared happy that the deceased had died.

During cross-examination the witness admitted that their neighbourhood was prone to crime and, in particular, robbery. She also testified that the 1<sup>st</sup> accused was arrested before she made the report to the police. It was her evidence that there was a grudge between the deceased and the 1<sup>st</sup> accused. The 2<sup>nd</sup> accused was his brother and that they were both their neighbours. She had no idea of why and when he was arrested.

The deceased's son Paul Nderi Waigwa (PW2) testified that he was awakened by his mother to attend to the deceased who was then groaning in pain. He sought to know from him what happened and all he heard from him was 'Kagutu' and 'my phone'. He understood Kagutu to be the 1<sup>st</sup> accused. He then called his uncle Josephat Ndumia (PW7) who came and directed that the deceased be taken to hospital. They walked him to a dispensary where he died.

Ndumia himself testified that he was the deceased's brother and that on 14 December 2009 at about 11 PM he heard the deceased's wife call out his son. He proceeded to his brother's house and found him alive but that he was bleeding from the nose and mouth. They took him to Kinungi health centre before they proceeded to Kinungi police base to report.

Other witnesses who testified but whose evidence was peripheral, in my view, were Charles Nduru Ndungu (PW4) and Daniel Ndirangu Gathuya (PW5); Ndungu's evidence was that the deceased was at his barber shop for a haircut on 14 December 2009 at 7.30 PM while Gathuya testified that the deceased was his uncle and that he had had also been arrested as a suspect of his murder but was later released. On his part James Njuguna Gichuki (PW8) testified that he had been drinking with the deceased at Kinungi on the fateful night; he left at 9.30 PM and said that he was going home.

Rose Wanjiru Kariuki (PW6) testified that she was a nurse attached to Kinungi health centre at the material time. She had been called to attend to a sick child in the middle of the night when the watchman informed her that there was another patient outside the clinic who was nose bleeding. It turned out that the patient was the deceased accompanied by his wife and another person. She knew them because they were neighbours. Due to the condition the deceased was in, she sought for help from the sister-in-charge; together they tried to resuscitate the deceased but in vain.

The post-mortem on the deceased's body was conducted by Dr. Karianjahi but her report was produced in court by Dr James Waweru (PW2) who testified that the post-mortem was conducted a week after the death of the deceased, she observed that the deceased had deep cut wounds on the left side of the nose and the head. There was also abrasion on the right occipital region and a fracture on the head. In her opinion, the deceased died of cardiopulmonary arrest due to head injury.

The last prosecution witness was the investigation officer, police constable Richard Mwalimo (PW10). It was his evidence that on 15 December 2009 he was at his house at about 1AM when he was summoned to the office by the officer in charge of Kinungi police station, Sergeant Munuve, to attend to a case of assault. He found the deceased's brother, Joseph Waigwa, at the office; he reported that the deceased had been attacked at Kinungi and that he had come to collect a note from the police so that the deceased could be attended to at the hospital. The officer booked the report and issued Waigwa with a treatment note. The officer himself went to the hospital but he found when the deceased had already died. He testified further that he knew the deceased before this incident and that previously he had reported that Kagutu, Dan and Kagitho were threatening him because he was allegedly collaborating with the police and making reports against them.

The officer then proceeded to the accused's homes where he found them sleeping; he and apparently his colleagues broke into their houses and arrested them.

It was his evidence that he established in the course of his investigations that the deceased had been drinking at a certain bar at Kinungi but that he had left alone at about 9 PM; the 1<sup>st</sup> accused had also been at the same bar but had left earlier at about 8.30 PM.

In his answer to questions put to him during cross-examination, the investigation officer admitted that he could not directly link the accused persons to the deceased's death and that though three people are reported to have threatened him, one of them whom he identified as Dan was not among the accused persons; the same Dan had earlier damaged the deceased's property but the case against him was apparently settled out of court.

The officer testified that nobody directed him to go to the accused person's home and that he only went there and arrested him because of the report the deceased earlier made about the threats by the accused.

In their defence, the accused denied having anything to do with the deceased's death. On his part, the 1<sup>st</sup> accused admitted that he knew the deceased and that he was a relative and they were also neighbours. On 14 December 2009 he was sleeping in his house when police officers came and arrested him; he did not know why he was arrested until he was charged. He also denied that he was called Kahutu or Kagutu.

Similarly, the 2<sup>nd</sup> accused also denied having murdered the deceased. As a matter of fact, he was arrested not at his house as the investigation officer suggested but at the police station where he had gone to check on his brother the 1<sup>st</sup> accused. He lived in the same compound with the 1<sup>st</sup> accused and he was in his house when the 1<sup>st</sup> accused was arrested and therefore if he was a suspect, he ought to have been arrested at the same time his brother was arrested.

Turning to the law, the offence of murder is defined in **section 203** of the **Penal Code** and previously it carried with it a mandatory death sentence prescribed in **section 204** of the same Code. This latter section has since been declared to be inconsistent with the Constitution for the reason that it prescribed death as a mandatory sentence leaving no room at all for exercise of the trial court's discretion in meting out a sentence depending on any mitigating factors or otherwise a sentence that is proportionate to the circumstances of each particular case. (See the Supreme Court decision in **Petition No. 15 of 2015 Francis Karioko Muruatetu & Another versus Republic (2017) eKLR**).

Turning back to section 203, it 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.***

A person's death and the unlawful nature of the death are some of the important attributes which the state has to establish in order to prove the offence of murder; others, according to this provision, are that the death in question was as a result of an act or omission of the accused person and, that the accused was motivated by malice aforethought. Malice aforethought itself 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**).

In Kenya it has been given statutory expression in **section 206** of the Penal Code; this provision of the law prescribes the circumstances under which malice aforethought may be deemed to have been established.

The evidence against the accused has to be assessed from this legal perspective.

The fact of death of a person has been proved to my satisfaction and there is no doubt that one Joseph Waigwa Nduru was certified to be dead on 22 December 2009. This certification was made by a pathologist who opined further that the deceased died as a result of 'cardiopulmonary arrest secondary to severe head injury'.

The evidence of the pathologist also goes to show that the death could not have been lawful; going by their nature, it is not possible that the fatal injuries were self-inflicted; neither was there any evidence that they were caused lawfully. Based on these facts, I am satisfied that the death of the deceased was unlawfully caused by the action of another person.

The next pertinent question is whether the accused were the authors of these injuries. In answering this question, I have to proceed on the understanding that none of the witnesses saw the accused or any other person attack the deceased; as earlier noted, the accused were charged with the murder of the deceased either on the basis of an alleged statement made by the deceased to his wife soon before he died or on an alleged report to the police of threats by the accused to the deceased.

When I consider these theories, I am unable to come to any firm and safe conclusion that there is evidence sufficient enough to sustain a conviction based on either of them or both of them combined. I say so for the following reasons.

The circumstances of the deceased death are given in the post-mortem report as follows:

***The deceased's body was found lying in the middle of the road at Kinungi trading centre with visible injuries on the face. A dip (sic) cut or laceration on the left side of the nose observed leading to a conclusion preliminary (sic) of murder.***

It is not apparent from the post-mortem report who it was that 'found' the body but, taking the prosecution at its word, and since, in any event, the investigation officer testified that this part of the report was an extract of the report of the deceased's death as was entered in the occurrence book, it is apparent that the deceased was dead at the time he was found; I cannot find any other meaning from this statement. It follows that, contrary to the deceased's wife's and his son's testimony, it is more probable than not that the deceased did not reach home that night and so he couldn't have had occasion to talk to either of them or any other witness before he died.

Joseph Ndumia (PW7), the deceased's brother whom the investigation officer testified that he made the report of the deceased's death to the police testified that he went to the deceased's house and found him there with his wife; he was allegedly bleeding from the nose and mouth and therefore he took him to hospital. The question that arises from his testimony and which was not answered is why was his report to the police materially different from his testimony of what he saw? Why, on the one hand, tell the police that the deceased was found lying in the middle of the road and on the other hand, tell the court that he found the deceased in his house with his wife except that he was injured?

Assuming the version of the events given to the police was incorrect, then the evidence that the deceased was taken to hospital where he eventually succumbed to his injuries ought to have been corroborated by Rose Wanjiru (PW6) who is alleged to be the nurse who attended to him at Kinungi health centre. However, this health officer did not provide any documentary proof that the deceased was attended to in that hospital as a patient of any description. Again, neither of the witnesses including the investigation officer identified or produced what they described as 'note' given by the police to facilitate the treatment of the deceased.

Apart from these inconsistencies being fatal to the prosecution case in themselves, one other vital conclusion that can be made is that there is a reasonable doubt as to whether indeed the deceased spoke to his wife and, therefore, whether there was a dying declaration which the court could consider as part of the prosecution evidence against the accused.

The other angle that the state advanced in the prosecution of its case was the indirect or circumstantial evidence; I understood this to be what the investigation officer implied when he stated in his testimony that prior to the deceased's death, he had reported to the police that the accused persons had threatened him. It is not clear the form the threats took but whatever their nature there was no evidence that any report of such threats had been booked at the police station or that the report had been investigated and action taken against the accused persons. It is absurd that the investigation officer could be heard saying that he arrested, at least the first accused based on this report. Be that as it may, the net result is that without proof of any such report, the investigation officer's evidence could neither be considered as corroborative or circumstantial for that matter. The arrest and the subsequent prosecution of the accused was effectively based on nothing more than suspicion and here I agree with the learned counsel for the accused that suspicion, in itself, cannot found a prosecution let alone a conviction. It may be a basis for investigation but certainly not a prosecution or conviction. In **Sir John Woodroffe & Syed Amir Ali's Law of Evidence 18<sup>th</sup> Edition Vol. 1** also cited by the learned counsel for the accused, it was stated at page 362 as follows:

***Suspicion, however grave, is not proof. In the absence of reliable evidence it is unwise to act on mere suspicion...However strong or grave a suspicion may be, suspicion cannot take the place of proof.***

The state of the prosecution case was summarised by the investigation officer when he finally admitted during his cross-examination that he could not directly link any of the accused persons with the deceased's death. Of course, a court can convict on indirect or circumstantial evidence but this evidence was also lacking to support a safe conviction. It is trite that 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 on the part of the accused person. (See **Republic versus Kipkering Arap Koske & Another (1949) XVI EACA 135** and **Simon Musoke versus Republic (1958) EA 715**). Looking at the evidence before court, there is no material upon which this court can draw an inference of guilt on the part of the accused.

In the ultimate I hold that the state has not proved its case beyond reasonable doubt against the accused. They are accordingly acquitted of the charge of murder.

**Dated, signed and delivered in open court this 20<sup>th</sup> day of September, 2019**

**Ngaah Jairus**

**JUDGE**