



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MURANG'A**

**CRIMINAL CASE NO. 29 OF 2018**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**MERCY WANJIRU KARIUKI.....ACCUSED**

**RULING NO. 2**

1. The accused is charged with *murder* contrary to section 203 as read with section 204 of the **Penal Code**.
2. The particulars are that on 11<sup>th</sup> August 2017 at Mairi Trading Centre, Kigumo Sub-County within Murang'a County jointly with others not before the court murdered *John Paul Maina Macharia*.
3. She pleaded not guilty. The Republic lined up *eight* witnesses. The prosecution's case is built entirely on *circumstantial* evidence. The question now is whether the evidence raises a *prima facie* case.
4. PW1 heard the deceased screaming. She went to his house. She and the deceased were tenants in a block of rooms at Mairi centre. It was dark. She saw someone emerge from the kitchen holding a smoldering piece of wood. Another neighbour brought a torch. When they shone it on the face of the person, they discovered it was the deceased. He was bleeding on the leg. The deceased fell down. They tried to enquire what had happened. But he did not utter a word.
5. Another neighbour, Peter, sought a vehicle to ferry the deceased to the hospital. But by the time he returned to the scene, the deceased had succumbed to the injuries.
6. The evidence shows that the accused and the deceased used to be lovers. The affair was known by the deceased's father and siblings (PW3, PW4 and PW5). The accused and the deceased had on one occasion visited their rural home and spent some nights there. But there seems to have been a bitter fall-out. The deceased started a new relationship with another woman, PW2. PW2 and the deceased were workmates at a Chinese construction firm.
7. PW2 testified that on 10<sup>th</sup> August 2017, the accused came to the house of the accused. She demanded her clothes and a refund of Kshs 30,000 she allegedly used to procure an abortion. The following day, the deceased and the accused took their dispute to the office of the Assistant Chief. PW2 accompanied the deceased but left him at the chief's office.
8. PW2 said the deceased returned to work at 2.00 p.m. and told her that they had resolved the matter: He was to repay the money; and, make arrangements for the accused to collect her clothes from his parent's home. A sister of the deceased (PW3) confirmed that on 11<sup>th</sup> August 2017 her brother, David Macharia (PW4) gave her the clothes. She sent the clothes by a *matatu* to Kangari.
9. At 5.30 p.m. on 11<sup>th</sup> August 2017, PW2 went to the deceased's house. The deceased escorted her out at about 6.00 p.m. PW1 confirmed that she saw the deceased and PW2 at about that hour.
10. PW2 called the deceased on his phone at about 9.00 p.m. The call did not go through. In cross examination, she conceded that she sent the deceased a nasty message enquiring whether the deceased and the accused had re-united. PW2 testified that she later learnt from a colleague that the deceased suffered some injuries and died.
11. The father of the deceased (PW5) went to the scene at about 11:00 p.m. in the company of his son, PW4. There was blood on the verandah. There were no security lights; but he had a torch. A neighbor informed him that the deceased was taken to Githumu Hospital mortuary by the police. He went there and saw the body.
12. PW6 was Police Corporal Makau. He saw the body at the scene. Blood was oozing from the left thigh. The body was 10 metres from the deceased's house. There was a fire in a make shift *jiko* in the deceased's house. He said that Inspector Wainaina and another officer went

back to the scene later. After some further investigations the accused was charged.

13. There is then the evidence of Police Officer Obiero (PW7). He was instructed to trace the accused. He wrote to *Safaricom* on 6<sup>th</sup> September 2017 for data on phone number [particulars withheld]. It showed that the accused was at Mairi on 11<sup>th</sup> August 2017 at about 19:35 hours. On 14<sup>th</sup> September 2017 they traced the signal to Kitengela but her phone was off. On 10<sup>th</sup> July 2018 accused's phone was active. The police arrested her at EPZ Athi River. The call data was produced as exhibit 1.

14. The witness said that the accused escaped from the scene of crime. He said in re-examination-

*The data shows accused after 19:30 hours left Mairi through Makamboki, Gatura, Gitune route. She did not use the Kangari route. So she was trying to escape.*

15. The pathologist did not testify. However, the post mortem report was produced by PW8 under section 77 of the **Evidence Act**. The defence had no objection. The cause of death was "cardiopulmonary failure from hemorrhagic shock due to stab wound through left femoral artery".

16. Learned counsel for the accused filed submissions on 14<sup>th</sup> August 2019. The Republic opted *not* to file any submissions.

17. Section 203 of the **Penal Code** provides that *any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.*

18. There are three key ingredients that *must* be present in the offence of murder: first, the prosecution must prove beyond reasonable doubt the *death* of the deceased and the *cause* of that death; secondly, that the accused *committed* the unlawful act that led to the death; and, thirdly, that the accused was of *malice aforethought*. Malice aforethought is the *mens rea* or the *intention* to kill another person.

19. There is absolutely *no* doubt about the *death* of the deceased. He bled to death from a deep stab wound on his left thigh. From the post-mortem report (exhibit 3), the cause of death was "cardiopulmonary failure from hemorrhagic shock due to stab wound through left femoral artery".

20. I also entertain *no* doubt that the cause of death was *unlawful*. There was no *eye witness* to the murder. Like I stated, the entire case for the prosecution is built upon *circumstantial evidence*.

21. In **R v Kipkering arap Koske & another** 16 EACA 135 (1949) the court held-

*In order to justify the inference of guilt, the inculpatory fact must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt*

22. There are *three* incriminating pieces of evidence: Firstly, the accused was unhappy about the termination of her relationship with the deceased. She had been introduced to her prospective in-laws. Her clothes were still at the rural homestead of the deceased. If PW2 is to be believed, the accused spent Kshs 30,000 to procure an abortion. She was now demanding the money and the clothes. Arguably, she had a motive to kill the deceased.

23. However, the accused was last seen with the deceased at the office of the chief on the afternoon of 11<sup>th</sup> August 2017. The deceased returned to work at 2:00 p.m. and met with PW2. No one saw the accused at the house of the deceased on the night of the murder. In fact, the last person to be seen with the deceased at about 6:00 p.m. was PW2.

24. The second piece of evidence is from the *call data* and the *cell phone* (exhibits 2 and 3). It placed the accused at Mairi at about 19:35 hours on the material night. As detailed earlier, the accused and the deceased had a meeting at the chief's office that afternoon. What is material is the assertion by the police that she escaped from the *locus in quo*. According to PW7, *the call data showed that the accused left Mairi through Makamboki, Gatura, Gitune route instead of the Kangari route.*

25. The third piece of evidence is the arrest of the accused a year later far away in Athi River. I agree that it is suspicious that the accused switched off her line for such a long duration. But she was arrested at her work station at EPZ Athi River.

26. All the three pieces of evidence amount to *strong suspicions* that the accused may have had a hand in the matter. But they remain just that. In our legal system, the *burden of proof* of the *murder* rests entirely on the prosecution.

27. In a criminal trial, the *standard of proof* is beyond any reasonable doubt. As things stand, there is absolutely no direct or reliable evidence *proving* that the accused either alone or jointly with others killed the deceased.

28. In a synopsis there is no evidence to *convict* if the accused opts to *keep mum*.

29. The law on that subject was succinctly captured in **Bhatt v Republic** [1957] E.A. 332 at 334-

*Remembering that the legal onus is always on the prosecution to prove its case beyond reasonable doubt, we cannot agree that a prima facie case is made out if, at the close of the prosecution, the case is merely one-*

which on full consideration might possibly be thought sufficient to sustain a conviction.’

*This is perilously near suggesting that the court would not be prepared to convict if no defence is made, but rather hopes the defence will fill the gaps in the prosecution case. Nor can we agree that the question whether there is a case to answer depends only on whether there is-*

*‘some evidence, irrespective of its credibility or weight, sufficient to put the accused on his defence.’*

*A mere scintilla of evidence can never be enough: nor can any amount of worthless discredited evidence. It is true, as WILSON, J., said, that the court is not required at that stage to decide finally whether the evidence is worthy of credit, or whether if believed it is weighty enough to prove the case conclusively: that final determination can only properly be made when the case for the defence has been heard. It may not be easy to define what is meant by a ‘prima facie case’, but at least it must mean one on which a reasonable tribunal, properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence.*

30. On the totality of the evidence; and, from my analysis of the legal authorities, I am not persuaded that the Republic has proved a *prima facie* case against the accused *sufficient* to place her on her *defence*.

31. Accordingly, under the provisions of section 306 (1) of the **Criminal Procedure Code**, I enter a finding of *not guilty*.

32. The accused is hereby *acquitted*.

It is so ordered.

**DATED, SIGNED and DELIVERED at MURANG’A this 22<sup>nd</sup> day of October 2019.**

**KANYI KIMONDO**

**JUDGE**

**Ruling read in open court in the presence of-**

Accused.

Ms. Muritu for the accused.

Mr. Mutinda for the Republic.

Ms. Dorcas and Ms. Elizabeth, Court Clerks.