



**REPUBLIC OF KENYA**

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

**CRIMINAL CASE NO. 30 OF 2016**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**ELIZABETH WANGARE NDERITU.....ACCUSED**

**JUDGMENT**

1. **Elizabeth Wangari Nderitu (Elizabeth)** is charged with the murder of **Julius Njagi (the deceased)**. The information states that the deceased was murdered on **10th October 2015** at **Pesi Trading Centre** in Laikipia County. **Elizabeth** pleaded not guilty and the trial proceeded. The prosecution bears the burden of proof. The burden of proof is one beyond reasonable doubt.

2. The prosecution is required under Section 203 of the penal code to prove the following ingredients:

**a. The fact that the deceased died and the cause of death.**

**b. Proof that the accused caused death of the deceased by unlawful act or omission.**

**c. Proof that the accused committed the unlawful act or omission with malice aforethought.**

3. The fact that the deceased died was confirmed by **Kevin Wanjohi Gacheru (Kevin)** who together with **Cyrus Muriuki Muturi (PW4)** took the deceased to hospital. The deceased was pronounced by the doctor as dead on arrival.

4. A post mortem was carried out on the deceased's body. It revealed that he had penetrating chest stab wound. Deceased suffered perforation of the lung and heart. This caused the deceased to suffer hypovolaemic shock due to severe haemorrhage.

5. The prosecution on the second ingredient was required to prove that the death of the deceased was as a result of unlawful act or wrong omission of the accused. The prosecution's evidence was through 10 witnesses.

6. On **9th October 2015**, the deceased was in the company of **Kevin** and **James Macharia Warima (James)**. They were taking alcohol at Kihato Bar. **James** telephoned **Elizabeth** and asked her to join them. **Elizabeth** went to join them at the bar in the company of her friend called **Wambui**. **Elizabeth** and **Wambui** lived in the same plot. At closing time of that bar, the bar owner asked them to leave. This was at 10.45pm.

7. When they left the bar, deceased went with **Elizabeth** while **Wambui** went with **James**. Deceased as he left informed **Kevin** that he was taking **Elizabeth** to her home and requested **Kevin** who owned a motor cycle to pick him from **Elizabeth's home**. **Kevin** estimated the distance between the bar and **Elizabeth's home** to be two and half Kilometre. As the deceased left the bar in the company of **Elizabeth** and **James** in the company of **Wambui**, **Kevin** was left finishing his beer.

8. **Kevin** drove his motor cycle towards the direction of **Elizabeth** and **Wambui's** plot. He met **James**. Both of them sat to wait for the deceased. They waited for 20 minutes. The intention of **Kevin** was to carry both the deceased and **James** and take them to their homes. As they waited, **Kevin** said that he saw **Elizabeth** running. This is what he stated:

***“as we sat we saw Wangari (Elizabeth) running. The lights were on. She did not expect to see us there. She (Wangari) was running. She said that the person who she was [with] in the club was at the plot at the tap and he was bleeding.”***

9. **James** also confirmed in evidence that the deceased left the bar in the company of **Elizabeth**. He confirmed also that he left in the company of **Wambui**. He said that he left **Wambui** at her gate. **James** later met **Kevin** and they sat down near the plot of **Elizabeth** and **Wambui**. They waited for the deceased. This is what **James** stated in his evidence:

**“a while later, we heard noise at the plot of Elizabeth Wangari (accused). I telephoned Wangari and asked her why the noise. She (Wangari) said Njagi (deceased) is the one disturbing her. A while later, Wangari came towards me and Kevin running saying that person disturbing me is lying over there at the tap.”**

10. **James** confirmed that **Elizabeth** said that the disturber was lying at the tap. **Elizabeth** then, ran away refusing to answer **James**' questions on who was disturbing her.

11. **Kevin** ran into the plot first. He found the deceased lying down holding onto his chest. There was sufficient security lights to enable **Kevin** see when he lifted the deceased up, that the deceased was bleeding. The deceased informed **Kevin** that **‘that girl has hurt me’**. Deceased then asked to be taken home. As they walked at the gate of the plot, and **Kevin** released his support, the deceased fell down. **Kevin** noticed that the deceased had a big wound. Deceased was taken to hospital in a car driven by PW4. They took the deceased to Charity Hospital where the doctors pronounced the deceased as dead.

12. **Tabitha wanjiru Ngira (Tabitha)** was the immediate neighbour of **Elizabeth**. She lived next door to **Elizabeth** in the plot for one month prior to this incident. Tabitha referred to **Elizabeth** as mama **Rispa**.

13. On **9th October 2015**, near midnight, while **Tabitha** was in her house, she heard a man's and a woman's voice. As they neared the plot, **Tabitha** heard as though they were quarrelling. The two were conversing in Kikuyu language. She heard the man asked for Ksh 800, the woman responded by saying she would give him Ksh 600. **Tabitha** heard the woman tell the man that she would have to get the money from her house. It was then that **Tabitha** noted the woman's voice was that of **Elizabeth**. **Tabitha** heard both the man and **Elizabeth** getting to **Elizabeth's** house. She heard **Elizabeth** pulling a plastic chair and asking the man to sit down.

14. **Tabitha** then heard **Elizabeth** saying to the man in Kikuyu language, **‘pride yourself the way you are priding yourself outside.... take Ksh 600 of otherwise I will scream.’** **Tabitha** heard the man say; **‘I do not fear women scream’**. At that point **Tabitha** recognized the man as **Julius Njagi** (deceased) who she knew. She described the deceased as a broker. That is, that he would buy things from **Tabitha** and others then re-sell the same.

15. **Tabitha** heard **Elizabeth** and the deceased struggling. The door to **Elizabeth's** house was opened very roughly and it hit the wall. **Tabitha** said that she heard the accused say **‘You dog prostitute, how long will you trouble me’**.

16. **Tabitha** opened the window of her house and she heard the man fall in the tap area. She stated that she saw **Elizabeth** lift up the deceased using the light of her cell phone and looked at his eyes. According to **Tabitha Elizabeth** looked confused. She saw **Elizabeth** go to the gate then return. She saw her go to the tap and wash her hands. **Elizabeth** then went to her house and locked herself in. She left her house and went to Wambui's house. From Wambui's house Tabitha saw Elizabeth ran out of the plot but she returned with two men. The three lifted the deceased and took him outside the gate. **Tabitha** saw **Elizabeth** return to wash and scrub the tap area. Thereafter, Elizabeth left the plot and did not return. **Titus Kanyi Murimi** (Titus) was a resident of Pesi Area and was known to Elizabeth. He worked as an attendant in a petrol filling station. Titus sometimes gave Elizabeth casual work of laundering his clothes.

17. **Titus** said that on **8th October 2015**, he travelled to Nakuru. He left his house keys with Elizabeth requesting her to clean his clothes. On **9th October 2015**, he arrived back at Pesi at 9pm. He telephoned Elizabeth who brought him his keys. Elizabeth left and they agreed to see each other later. Titus agreed to leave his door opened to enable Elizabeth to enter.

18. Later between 11pm and 12 am, Titus called Elizabeth to inquire if she was still going to his house or whether he should proceed to close his door. **Elizabeth** responded by saying that someone had fallen ill at their plot. Then Titus said: **‘a little while later, I heard someone enter in [a] hurry. I asked her (accused) are you being chased.’**

19. **Elizabeth** responded by saying that someone fell ill. Titus then stated that Elizabeth sat on a chair and she was scrolling her phone. At 1pm Elizabeth asked Titus whether she could sleep at his house. 45 minutes later, the door was knocked and the police entered and arrested both of them.

20. **Elizabeth** gave sworn evidence in her defence on **9th October 2015**, she stated that she was at home with her young children. At 7 pm, she received a call from a friend called James (PW5) James informed her that they were at Kihato bar, he requested Elizabeth to join them. Elizabeth first cooked for her children and fed them. At 8 pm, she left her children asleep.

21. **Elizabeth** went to Kihato bar with her friend Wambui. At the bar, they found Kevin, James and the deceased. Elizabeth and Wambui joined them in taking alcohol until 11.30 pm. **James** and **Wambui** left first and Elizabeth in the company of the deceased followed. Kevin was left at the bar.

22. **Elizabeth** stated that when they were near her home, the deceased asked her to refund him Ksh 1000 the money he had used to buy her alcohol. She informed him that she only had ksh 500. That they met up with **James** and she requested James to take the deceased away because he was drunk. **James** declined.

23. When they reached at Elizabeth's gate, Elizabeth requested the deceased to wait at the gate but the deceased followed her shouting; **‘my money’**. Elizabeth threatened to call her neighbours and tell them that she did not know the deceased. That the deceased responded by saying he did not fear women.

24. When Elizabeth opened her door she gave the deceased Ksh 500 from her handbag. That the deceased entered her house and sat on her plastic chair and refused to get out unless he was paid his money. The deceased said that if he did not get his money he would sleep there. Elizabeth did not want him to sleep there because the deceased's wife, if she found out, would be unhappy.

25. That the deceased then stood up and held Elizabeth by her clothes on her chest and slapped her asking for his money. The deceased slapped her again and was shaking her body. The deceased took her phone and threw it. Elizabeth said that she did not know if the phone was damaged. Deceased was still holding onto her as they struggled together. The deceased then took a knife which was on the cupboard and told her that if he did not get his money, he would kill her that day. Elizabeth then stated:

***“he was holding the knife with the right hand....we began to struggle. I wanted to take the knife from him. He was still holding the knife as though he wanted to stab me. We struggled for twenty minutes. After that, I was not aware he was stabbed. He then said, ‘I will leave you; he stopped holding me. He opened the door and left.’”***

26. **Elizabeth** went out of the gate, then returned with Kevin and James to show them where the deceased lay. She then left to go to Titus’ house.

27. Is there any evidence that show Elizabeth was responsible for the unlawful act that led to the death of the deceased? The evidence presented by the prosecution is circumstantial. The test on what circumstantial evidence can lead to conviction was considered in the case Republic vs Stanley Muthike Tiire [2018]eKLR viz:

*“In ABANGA alias ONYANGO V. REP CR. A. NO. 32 OF 1990 (ur) the Court of Appeal set out the principles to apply in order to determine whether the circumstantial evidence adduced in a case are sufficient to sustain a conviction. These are:*

***“It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: (i) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established, (ii) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused; (iii) the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.”***

28. The circumstantial evidence that the prosecution presented was that Elizabeth left in the company of the deceased. She was heard by her neighbour Tabitha quarrelling with the deceased. Tabitha also heard a struggle going on. Tabitha most importantly heard the deceased asking Elizabeth for his money. Although Elizabeth said that the deceased wanted to be refunded money he used to buy her beer, the evidence of Kevin in that regard was that it was James who bought Elizabeth and Wambui alcohol. James in evidence stated that alcohol was paid by all of them.

29. The learned counsel for Elizabeth did not cross examine those witnesses on their evidence on who purchased the alcohol. It follows that for Elizabeth to state in her defence that the deceased was demanding for his refund for alcohol he purchased was an afterthought. It was not put to the witnesses with whom they were taking alcohol.

30. **Tabitha** identified **Elizabeth** and deceased by their voice. The evidence of voice recognition is receivable by the courts as was stated in the case of Republic vs Nicholas Ngugi Bangwa [2015] eKLR viz:

*“In Choge vs Republic [1985]KLR 1 the Court of Appeal held in part that:*

***“Evidence of voice identification is receivable and admissible in evidence and it can, depending on the circumstances, carry as much weight as visual identification. In receiving such evidence, care would be necessary to ensure that it was the accused person’s voice, that the witness was familiar with it and recognized it and that the conditions obtaining at the time it was made were such that there was no mistake in testifying to that which was said and who said it.”***

31. Further the evidence of Tabitha was that once Elizabeth and the deceased entered Elizabeth’s house, Elizabeth threatened the deceased that she would shout to alert her neighbours that she did not know the deceased. It does therefore seem that Elizabeth felt in a stronger position the moment they entered her house.

32. Post mortem report, indicated that the deceased suffered a stab wound 1cm by 6cm. That indeed was very deep wound and it is inconceivable that Elizabeth would not have known that the accused had been stabbed when he fell at the tap. The more likelihood is that it was Elizabeth who stabbed the deceased. The injury on the deceased is inconsistent to a stab wound caused during a struggle. More importantly the deceased did tell Kevin before he died that it was Elizabeth who hurt him. Kevin was not cross examined by the defence counsel in regard to that aspect of his evidence and it must therefore be taken to be the truth. Elizabeth gave herself away by telling Kevin and James that the one who was disturbing her was at the tap. What that reveals is, one, that the deceased was disturbing her and two, she caused the death of that disturber.

33. It is important to state that I had the opportunity to hear and observe the witnesses and Elizabeth as they testified. I was impressed by the consistency of the prosecution’s witnesses. I wholly believe the evidence of Kevin and James. That evidence clearly pointed that it was Elizabeth who was in the company of the deceased upto the time he was stabbed.

34. On the contrary, I did not believe the evidence of Elizabeth. I observed her and I was not convinced of her truthfulness as she testified.

35. It follows that the circumstantial evidence cogently and firmly established the guilt of **Elizabeth**. The circumstances and unerringly point to the guilt of **Elizabeth**. Finally, all the circumstances taken cumulatively form a chain so complete that the conclusion is that the crime was committed by **Elizabeth**. See the case of Republic vs Stanley Muthike Tiire [2018] eKLR (supra).

36. I therefore conclude that **Elizabeth** committed the unlawful act that resulted in the death of deceased.

37. There is evidence that Elizabeth and the deceased quarreled to the extent that their neighbour Tabitha, and those who were outside the gate Kevin and James heard them. Deceased was demanding money while Elizabeth was reluctant to pay that money. It became clear that in those circumstances, Elizabeth formed the decision to stab the deceased in order to stop him from disturbing her. That after all is how she communicated to Kevin and James. There is therefore proof that Elizabeth's unlawful act was committed with malice aforethought.

38. It is because of the above finding, that I find Elizabeth **guilty as charged**. I hereby **convict Elizabeth Wangare Nderitu** of the murder of **Julius Njagi** (deceased) contrary to Section 203 of the penal code.

**DATED AND DELIVERED THIS 2<sup>ND</sup> DAY OF NOVEMBER, 2018.**

**MARY KASANGO**

**JUDGE**

**CORAM**

Before Justice Mary Kasango

Court Assistant :Mariastella

Accused: Elizabeth Wangare Nderitu

For Accused.....

For State:.....

**COURT:** Judgment delivered in open court.

**MARY KASANGO**

**JUDGE**