



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CRIMINAL CASE NO. 62 OF 2008

REPUBLIC

VERSUS

SERAH WAKARIMA KANIARU

JUDGMENT

On 1st November, 2008, the partly mutilated body of Joseph Githuka Kimwatu (herein “the deceased”) was found in a farm several metres away from the house in which he lived together with his young wife, their four-year-old son and his father. He had disappeared two days earlier and it would appear that he may have died soon after he disappeared because at the time it was discovered, his body was in a decomposing state. His wife was suspected to have murdered him and so on 12th November, 2008, she was charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code, cap. 63. The particulars are that on diverse dates between 28th October, 2008 and the 1st day of November, 2008, jointly with others not before court, the accused murdered Joseph Githuka Kimwatu.

She pleaded not guilty and so it behooved the state to prove its case against her; to this end, as many as sixteen witnesses testified on its behalf. Of these witnesses, three were police officers, one was a government analyst while the rest were civilian witnesses most of whom were related to the deceased, in one way or the other.

The first to testify was the deceased’s father, Stephen Kimwatu Kanyungu (PW1); he informed the court on oath that he lived with the deceased and they shared the same house though they occupied separate rooms; the deceased shared his room with his wife and son. The last time he saw his son was on the 27th October, 2008 at about 4.30 PM at Othaya town where he had come to buy dog meal. He got to know that his son had not returned home the morning of the following day. When he enquired from the deceased’s wife, she told him that the deceased had travelled to Nyeri.

By the 29th October, 2008 the deceased had not returned home and being anxious of where he could possibly be, the witness called his daughters in Nairobi to inform them of his son’s disappearance.

On 1st November, 2008 while he was at home, he heard screams in his farm not far from his house; he proceeded in the direction of the screams only to find the deceased’s body lying in napier grass; its stomach and neck had been slit.

Upon cross-examination, he testified further that he had left his son at the bar in Othaya town and he did not hear him come back to the house that evening; neither did he hear of any commotion or any sort of noise on that night. He couldn’t tell whether the deceased might have been murdered on his way back home.

Elizabeth Wanja Wamogi (PW2) was one of the witnesses who rushed to the scene when she heard screams; she found **Jane Wanjiku (PW12)**, the deceased’s step mother, at the scene together with the accused; they were both screaming. This witness observed that the deceased’s ears and upper lips had been cut. She reported the matter to the police.

According to **Pauline Wangui Wanyoike (PW3)**, the deceased’s step sister, a text message from the deceased’s phone was sent to her phone on 28th October, 2008, at 11 PM; it read, “*this is to let you know take care of father, my wife and my child. Bye Githuka*”. Alarmed by this message she contacted her father (PW1) who told her that the deceased had gone to visit his step-brother, Maina (PW11). When she called her sisters, **Jane Murugi Mwangi (PW5)** and **Virginia Wagaki (PW4)** about this message, they told her that they too had received text messages from the deceased’s phone almost at the same time as when Wanyoike (PW3) got hers. The message sent to Wagaki’s (PW4’s) phone read, “*I am sorry Wagaki, this is the work of the devil and the devil is defeated. Githuka.*” The response she got from the deceased’s wife is that the deceased had travelled to visit his step-brother. She was later informed that the deceased had died; as a relative of the deceased, she was among the people who positively identified his body for post-mortem purposes.

Virginia Wagaki (PW4) confirmed having received the text message from the deceased. She testified further that the deceased and the accused had been married for five months. They used to live in Othaya before they eventually moved and started living with the deceased's father in the same house.

Prior to their joining the deceased's father, the latter used to live with their step-mother (PW12). Their coming into that house, according to this witness, caused some friction between their mother and their father. It was her evidence that their step-mother had to be forcefully evicted by their father's clan, apparently to accommodate the deceased and his wife. She also testified that prior to his death the deceased had told her that he had received threats to his life.

Just like her two sisters, Wanyoike (PW3) and Wagaki (PW4), Jane Murugi Mwangi (PW5) also confirmed having received an unusual text message from the deceased on the 27th October, 2008 at about 9 PM. Her version of the message read, "*dear my loved sister. I love you. Tell my father to sell the Kieni cows and by another for my wife. Bye*". When she attempted to call him, the response from his phone was that he was out of reach. She testified that the accused had informed the police that their step-mother had come home with three men who had left with the deceased. According to her, her step mother never had cordial relationship with the deceased.

On his part the deceased's cousin **Stephen Macharia Wamunge (PW6)** testified that the accused had informed his wife on the 28th October, 2008 that the deceased had not come back home the previous evening. He called the deceased's step-brother **Maina (PW11)**, who the deceased is said to have gone to visit in Nyeri. The latter told him that he had not seen the deceased.

The witness testified that on 9th November, 2008, "they" recovered a polythene paper with blood stains, clothes, sheets, a blanket and the inner sole of his shoes. The deceased's mattress was also stained with blood.

Sergeant Stanley Kibugi (PW10) received the report of the deceased's death from **Elizabeth Wanja Wamogi (PW2)** at Othaya police station. The officer confirmed that earlier, specifically on the 31st October, 2008, the accused had reported at the same station the deceased's disappearance. Upon receiving a report of his death, the officer, accompanied by his colleagues whom he identified as Chief Inspector Mugambi, Chief Inspector Nzau, Constable Maina, Constable Mohamed and constable Ritho went to the scene and took the body to the mortuary.

Duncan Maina Kimwatu (PW11) who the deceased is alleged to have gone to visit testified that indeed on 26th October, 2008, the deceased had called him on his phone; he wanted some money. He sent the deceased Kshs. 2,000/= but he never saw him.

The deceased's step-mother, **Jane Wanjiku (PW12)**, testified that she knew of the deceased's disappearance from her daughter on 28th October, 2008. On 1st November, 2008 while in her shamba, she saw a swarm of flies over a body; upon moving closer, she recognised the body to be that of the deceased. The witness admitted that she was forced to leave the deceased's father's house when the deceased was about to get married. He was the only son in his mother's house. As for this witness, she had two sons and four daughters. Her house and the one where the deceased lived were about 6 feet apart. She testified that he had been married for between four and five months. She also admitted that she had been arrested in connection with the deceased's death and she remained in police custody for about three days before she was released. She agreed that there were differences between her and her husband.

Her daughter **Grace Murugi Kimwatu (PW13)** testified that she was at home on 1st November, 2008 when her mother stumbled upon the deceased's body. She had come from Nairobi the previous day upon hearing the news of the deceased's disappearance. As a matter of fact, her mother (PW12) had gone to the farm to get some potatoes for her to carry back to Nairobi when she discovered the deceased's body. She went to the scene and noticed that the deceased's body had been cut on the neck, chin and stomach.

Corporal Hudson Masaka (PW15) a scene of crimes officer took photographs of the scene; this he did on 19th November, 2008.

Corporal Samuel Nyamasi (PW16) the investigations officer, testified that he presented some items to the government analyst for examinations; according to his evidence, these items were either blood stained or soaked in blood. They included a blanket, a bed sheet, a newspaper, the sole of a shoe and a polythene bag. Others were pieces of timber, a piece of mattress and five pangas. Together with these items, he also presented for analysis the deceased's and the accused's blood samples for analysis.

It was his evidence that the blanket and the bed sheet were recovered in a pit latrine in the compound. According to him, it was **Stephen Macharia (PW6)** who discovered these items and called police officers who retrieved them from a pit latrine where they were dumped. The mattress and the bed parts were taken from the house. He decided to charge the accused after the analysis of the blood on these items showed that the blood was from the deceased and not the accused as she had allegedly suggested.

The government's analysts report was so influential to the decision to charge the accused that the deceased's step mother who had been arrested as a suspect in the murder was released. In the investigation officer's own words, "*we initially arrested the step mother because we thought she could have been involved as a result of land dispute*". In fact, he established in his investigations that the accused was recently married to the deceased and thus it was improbable that she would have wanted to kill him.

In what appears to be inconsistency in the investigation officer's evidence he alleged, without giving the basis of his allegations, that the deceased had at one point found the accused hugging a stranger at night and therefore there was bad blood between him and the accused.

The accused opted to give a sworn statement when she was put on her defence. She testified that she lived in peace with the deceased. On 28th October, 2008, she woke up and took their son to school as she usually did. She left the deceased in the house but he told her that he would be travelling to Nyeri. She then proceeded to Othaya town where she used to sell clothes. It was not until 6 PM that she returned home. The deceased's father arrived at about 8PM. They both tried to reach the deceased through his phone in vain. The following day, they went to Othaya court thinking that the deceased may have been arrested while drunk since he was used to drinking a lot. After failing to find

the deceased, she together with the deceased's father and Macharia (PW6) reported the matter to the police on 31st October, 2008. She learned of her husband's death on 1st November, 2008 when she heard her step-mother in law scream from the farm. She recognised his body when she moved to the scene.

The police took her to their house and conducted a search; they picked a panga from there; they also picked other pangas from a nearby church. She was then arrested and remained in custody for one week. She denied that she was present when the police collected the rest of the exhibits from the house; she could not identify the exhibits and she denied that they belonged to her. She denied having murdered the deceased.

This was all there was to the evidence presented before this honourable court; my immediate task is to analyse it in the context of **section 204** of the **Penal Code, cap.63** which defines the offence with which the accused was charged.

According to this provision, the offence of murder is committed when a person, with malice aforethought, causes the death of another by an unlawful act or omission. The punishment for this offence was previously a mandatory death sentence but in the wake of the Supreme Court decision in **Petition No. 15 of 2015 Francis Karioko Muruatetu & Another versus Republic (2017) eKLR, section 204** of the Penal Code in which this sentence was prescribed has since been declared to be unconstitutional; the net result is that the trial court now has the discretion to mete out a less severe sentence than the previous mandatory death sentence prescribed in **section 204**, in the event of a conviction.

The burden on the prosecution in this case was to prove the death of the deceased and that the death was not natural or was, in any event unlawful. It was further enjoined to prove that the unlawful death was not only as a result of an act or omission on the part of the accused but that it was also premeditated or rather the accused had malice aforethought.

From the evidence available, I am satisfied that the deceased's death was not natural; rather it was unlawful as understood in section 203 of the Penal Code. The deceased's father (PW1) testified that his son's lifeless body was traced in farm with injuries on the neck and stomach. According to Elizabeth Wanja Wamogi (PW2) the ears and part of the deceased's lips had been cut. Just like Wamogi (PW2) Stephen Macharia (PW6) also observed that the deceased's ears had been chopped off. Others who made observations of the bodily injuries were Grace Murugi Kimwatu (PW13) and Corporal Samuel Nyamasi (PW16), who, together with Stephen Macharia witnessed the postmortem exercise and positively identified the deceased's body.

To cap it all, the postmortem report established that the deceased sustained a deep cut on the anterior aspect of the neck and on the left ear. He also sustained a cut on his trachea and also a cut through the oesophagus and the cervical region. The pathologist opined that the cause of death was a '*a respiratory arrest secondary to transection of the trachea*'. He proceeded to certify the deceased's death and issued a death certificate to that effect.

The aggregate of this evidence can only lead to one conclusion; that deceased not only died but he died as a result of an unlawful act or omission, whatever the case may be.

Turning to the question of malice aforethought, it is the *mens rea* or the mental element of the offence of murder; it may be either 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 to unlawfully cause grievous bodily harm (see **DPP v Smith [1961] AC 290**).

The interrogation of the question of whether an accused person had malice aforethought or the necessary intent to commit the offence of murder presupposes that it has already been established, beyond all reasonable doubt, that the accused perpetrated the act or omission that caused a person's death. In other words, before the trial court can consider whether an accused had malice aforethought, it must first be satisfied that the accused was the architect of the act or omission in question. This being the case, the immediate question that arises is whether there is any direct or indirect evidence linking the accused with the murder of her husband.

From the very outset it is apparent that none of the prosecution witnesses ever witnessed the deceased's murder and therefore the prosecution case was based solely on indirect, circumstantial evidence.

According to the investigation officer (PW16), a blanket and a bedsheet, both stained with blood, were retrieved from a pit latrine in the compound where the deceased lived with the accused. It is in the same compound where the deceased's father and his step-mother (PW12) lived. The accused, according to this witness, disposed of these items in the toilet because she had had a rather heavy menstruation. When they searched the house, they also discovered that the mattress on which the deceased and the accused slept was also soaked in blood; similarly, their bed was blood-stained. The investigations officer and his colleagues carted away all these items for analysis by the Government analyst. The accused was subsequently charged based on the findings by the Government analyst.

Perhaps, because of the centrality of the Government analyst's report in the decision to charge the accused, it is necessary that we consider his evidence in detail at this stage. The Government Analyst, **Stephen Matinde Joel Waibe (PW7)** testified that he was presented with 10 items for examination; these items were 5 pangas, a blanket, a copy of the Sunday Nation newspaper of 26th October, 2008, the inner sole of a shoe and a yellow polyethene paper: others were, two pieces of timber, a piece of a mattress, the deceased's blood sample and the accused's blood sample.

Upon examination, he established that the pangas did not have any blood stains; the blanket, the bedsheet, the paper bag, the shoe sole and the piece of mattress were all stained with human blood of group "A". The analysis of the deceased's blood revealed that he was of the same blood group. The accused's blood was of group "AB". With these findings the analyst formed the opinion that the stains of blood on the newspaper, the piece of mattress, the bedsheet and the timber pieces matched the deceased's blood. His report in this regard was admitted in evidence.

To a great degree, this evidence explains why the state thought that the accused was the culprit in the murder of the deceased.

Turning back to the investigation officer's evidence, he testified further that he established in the course of his investigations that the deceased and the accused shared the same house with the deceased's parents who, according to his evidence, were the deceased's father and his step-mother.

In an apparent bid to demonstrate the motive behind the deceased's murder, the officer testified that the accused was involved in extra marital affairs because, so he alleged, the deceased had at one time busted her with a stranger in a compromising position; this, according to his evidence, was the cause of bad blood between them.

The only other person who implicated the accused in the murder of her husband was one **John Nderitu Kinyua (PW8)** who testified that the deceased had confided in him that he intended to marry another wife because the accused was illiterate. As a matter of fact, the deceased had asked him to find him (the deceased) another wife.

It is the task of this court to evaluate this evidence alongside the rest of the evidence and resolve the question whether the available circumstantial evidence is sufficient enough to sustain the conviction of the accused. Before answering this question, it is appropriate at this point to consider the law on circumstantial evidence, at least to the extent that it is relevant to this case. **Section 164** of the **Evidence Act, cap. 80** makes reference to this sort; 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.

As I have said in my previous decisions whenever this question of circumstantial evidence has arisen, all that I understand this provision of the law to say is 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. If the circumstances are proved beyond reasonable doubt, the court may convict, based on the circumstantial evidence, in the absence of direct evidence. The trial court must, however, be conscious that circumstantial evidence must be narrowly examined before drawing any inference of guilt on the part of an 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 his part.

I have often found the decisions **Republic versus Kipkering Arap Koske & Another (1949) XVI EACA 135** and **Simon Musoke versus Republic (1958) EA 715** to be apt on this particular issue.

In **Republic versus Kipkering Arap Koske & Another (supra)**, 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 (supra)**, 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.

As noted earlier, the alleged recovery of certain items soaked or stained with the deceased's blood constituted the inculpatory facts that heavily influenced the decision to charge the accused. The question that arises is whether these facts were incompatible with the innocence of the accused and incapable upon any other reasonable hypothesis other than the accused's guilt. My answer to this question is in the negative; I say so because the circumstances under which these items were allegedly recovered and the time it took the police to recover them after the recovery of the deceased's body leaves sufficient room for a reasonable doubt that the accused may be the culprit.

According to the investigation officer, the police officers were not aware of these items until Samuel Macharia (PW6) called and told them that he had discovered these items. He neither specified in his testimony where he found the items nor how he came across them. It is only the investigations officer himself who stated that certain items were retrieved from the pit latrine while others were found in the deceased's house.

Now, these items were allegedly found on 9th November, 2008, nine days after the recovery of the deceased's body and also nine days after the arrest of the accused. Several questions arise; having picked out the accused as a suspect in the murder of her husband, how possible is it that the police did not comb the house which the accused shared with the deceased, the moment they arrested her when they first visited the home? Why did the police only find it necessary to search the house after they had been allegedly called by Samuel Macharia (PW6)? Why did they search the house in the absence of the accused yet she was in their custody? Why was it not necessary to make any inventory of the items recovered and where they were recovered from?

I must confess that I have not found any answer to any of these questions from the prosecution evidence. Lest we forget, the burden of

proving facts which justify the drawing an inference of guilt from the facts that constitute circumstantial evidence to the exclusion of any reasonable hypothesis of innocence is on the prosecution; in my humble view, the prosecution has not discharged this burden.

It is also noteworthy that Samuel Macharia's (PW6's) mother (who, as noted, is the deceased's step mother) and his brother(PW11) were also suspected to have murdered the deceased and for that reason they were held in the police custody for a few days before they were released; yet it is the same Samuel Macharia who allegedly provided police with the critical information that led to the prosecution of the accused person.

Further, there still is what I consider to be other co-existing circumstances that weaken or destroy the inference of guilt on the part of the accused.

Going back to the deceased's father's evidence, he neither heard his son coming back home on the material night nor did he hear of any sort of commotion in the house on the night that he failed to turn up; his testimony left open the possibility that the deceased may have well been murdered on his way home from Othaya town.

It is also logical to conclude that since the deceased, his father and wife lived in the same house, the deceased's father would have known or at least sensed it, if there were any differences between the deceased and the accused and if their relationship had strained to such an extent that the accused was determined to eliminate her husband. It must not be forgotten that the accused and the deceased were barely five months old in their marriage.

I also found the suggestion by **John Nderitu Kinyua (PW8)** that perhaps the accused may have murdered her husband because he planned to marry another wife since the accused was illiterate to be doubtful. The couple had been together for barely five months; it does not make sense that the deceased would complain about his wife's illiteracy almost immediately after marrying her. For the same reason, it cannot be true that he would want to marry another wife at the infancy stage of his first marriage. Assuming that this witness' testimony was true, there is no evidence that the accused conspired to murder the deceased because she was either illiterate or felt insecure.

Again, the investigation officer's testimony that an extra-marital affair on the part of the accused might be reason for the death of the deceased was not supported by any evidence. He did not state the source of his information. In any event he contradicted himself in this regard when he stated he and his investigations team discarded that line of investigations because they did not think there was any substance in it.

To compound matters even further, the step-mother was forcefully evicted from her husband's house so as to accommodate the deceased and his wife. According to the deceased's sister, **Virginia Wagaki (PW4)** their father's clan had to intervene in order for their step mother to leave. This created differences between the deceased and his father, on the one hand, and the step mother, on the other. The investigation officer himself alluded to these differences; as a matter of fact, his team thought that the deceased's death was directly linked to these differences. It was his evidence that he had even been informed that the deceased's step-mother had been seen with three men who whisked the deceased away on the night he disappeared. A combination of all these facts explains why they arrested her but, for some reason, released her later.

Virginia Wangaki (PW4) confirmed that entry of the deceased and the accused into their father's house was the source of friction between their step-mother and their father. It was her evidence their step mother had to be forcefully evicted by their father's clan, apparently to accommodate the deceased and his wife. She also testified that prior to his death the deceased had told her that he had received threats to his life. Similarly, her sister, **Jane Murugi Mwangi (PW5)** testified that the relationship between the deceased and their step-mother was never cordial.

Taking all these circumstances into account, and considering them from the perspective of circumstantial evidence, I am persuaded to reiterate that what the prosecution presented as the inculpatory facts are incompatible with the accused's guilt; they are open to several other explanations the end result of which is to exculpate the accused. In addition, the co-existing circumstances destroy the inference of guilt on the part of the accused.

In the ultimate, I have to come to the conclusion that the circumstantial evidence is too weak to sustain a safe conviction. Accordingly, I hold that the case against the accused has not been proved beyond reasonable doubt and I therefore acquit her under section 215 of the Penal Code. The accused is set at liberty unless she is lawfully held.

Dated, signed and delivered in open court this 7th December, 2018

Ngaah Jairus

JUDGE