



**REPUBLIC OF KENYA**

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

**CRIMINAL CASE NO. 23 OF 2011**

**REPUBLIC.....PROSECUTION**

**VERSUS**

**PIUS MUTEMBEI MUKIRA..... ACCUSED**

**J U D G M E N T**

1. The accused faces the charge of murder contrary to Section 203 as read with Section 204 of the Penal Code. It is alleged that on the night of 18/10/2013 at Karingari Trading Centre in Embu West District, Embu County, he murdered one Martin Mugambi. The accused pleaded not guilty to the charge.
2. The evidence of the ten (10) prosecution witnesses may be summarized as briefly. On the 18/10/2013 at around 10.00 p.m., PW1 a former wife of the accused was
3. The deceased did not return to her home on the material day raising concern within her family. Her husband PW1 who looking for her the following day and reported the matter to the police as well as to the area Assistant Chief PW5.
4. PW5 engaged the village elder PW4, PW2 and others to search for the deceased on 19/07/2011. They followed leads given by her husband PW1 and went to the home of one Gilbert Kinyua PW3 where the deceased was said to have gone to buy vegetables. The Assistant Chief had already interrogated the accused an employee of PW3 in the farm in presence of PW4 and arrested him.
5. The search carried out by PW2, PW4, PW5 and other members of public led them to a bore-hole water well within the farm of PW3. The well was about 150-200 meters from the house of PW3. The body of the deceased was recovered from the bore-hole covered with fresh leaves on 19/07/2011 and was subsequently taken to the mortuary.
6. The accused gave the name of another suspect one Joyce Warue whom he said was his girlfriend and who had attacked the deceased when he found her in accused's house before the two suspects dragged the victim and threw him into the bore-hole. Joyce was arrested and later released on advice of the State Counsel.
7. The accused person recorded a confession before Runyenjes Principal Magistrate (PW10). The statement was to the effect that the accused took part in the murder as he assisted Joyce his girlfriend.
8. The doctor who performed the postmortem PW8 produced the report and found the cause of death to be asphyxia and drowning.
9. The accused in his defence denied murdering the deceased and Joyce Warue. He further stated that he

did not record a confession before PW10 as alleged.

10. In his submissions filed by his counsel Ms. Muthoni Ndeke, the accused argued that the only evidence before the court was circumstantial and not tight enough for the court to draw an inference that it was the accused who killed the deceased as opposed to any other person. Ms. Muthoni relied on two decisions to support her arguments on how circumstantial evidence should be dealt with.

11. The State on the other hand in its written submissions argued that the circumstantial evidence and the confession was sufficient to convict the accused person with the murder of the deceased. The confession was supported by the evidence of PW1, PW6 and PW10 according to the State. Ms. Nandwa concludes that the evidence proves the offence against the accused beyond reasonable doubt.

12. It is important to start on the premise that there was no eye witness in this case. The evidence adduced was circumstantial and the confession recorded by PW1.

13. The evidence of PW1 was that his wife the deceased left his home early in the morning to go to PW3's home where the accused worked. She was a grocery trader and went to buy vegetables. When she did not return home the material day, PW1 did not look for her elsewhere but went straight to PW3's home where he found his wife Grace. She inquired from the accused person who said that he had seen the deceased the previous day but does not know where she went thereafter.

14. The accused was interrogated by the Assistant Chief and the village elder PW6 and PW4. The witnesses testified that he in fact admitted that the deceased had gone to buy vegetables at his place of work. From the interrogation, PW4 and PW6 were convinced that the accused knew what had happened to the deceased. This was the reason for arresting him before search of the deceased in the compound of PW3 began. The body was recovered a short while after the arrest of the accused from the water well in PW3's home.

15. PW3 testified that he had left his home on the material day in the morning. When he returned in the evening he found the accused washing the shirt he was wearing on that day. He had been assigned work to feed the cow and repair the fence. PW3 said he found very little work done by the accused which was very unusual.

16. It is highly probable that the accused was occupied with other activities during the day and did not have time to carry out his normal duties. Most of his time could have been spent in or activities including the assault on the deceased and disposal of the body. It is also highly probable that the washing of the shirt may have been associated with cleaning of blood stained clothes in view of what had happened during the day.

17. The accused gave the name of Joyce Warue as his accomplice. She was arrested but the state counsel advised that she be set free. There is no other witness who saw Joyce in the house of the accused on the material day. It was the word of the accused alone that put Joyce in the picture. It is not known why the prosecution did not treat Joyce as a witness.

18. The deceased had bruises on the head and in her private parts. This was evidence of struggle between the attacker and the victim. The victim must have resisted rape and assault from her attacker. She had blood in the vagina and on the other bruised areas of her body. The doctor found the cause of death to be asphyxia and drowning. The doctor's opinion was that the deceased was alive and breathing when she was thrown into the well.

19. It was the evidence of PW9 that the confession was voluntary. PW9 said he is the one who escorted the accused to the office of PW10 to record the confession and that he was of good health which was confirmed by PW10. The witness complied with the law in recording the statement. During cross-examination, the defence did not raise the issue of involuntariness of the statement. This was an afterthought that came during the late stage of his defence.

20. Although the accused denied the confession, there was no evidence that it was involuntary or that the accused was tortured before recording it. When he appeared in court, the accused did not complain of anything as borne by the record. Before and during arrest, PW6 and PW7 told the court that the accused admitted having been involved in the offence. This must have continued during interrogation by the police while in custody.

21. It was his own oral confession that led to the accused being taken to the magistrate for recording of the formal confession. The accused was represented by a counsel who would have raised objection to the production of the statement in evidence if he was serious in repudiating it. The court would have held a trial within a trial to establish whether the confession was voluntary or whether it was recorded at all. It is noted that the accused signed on every page of the statement and did not specifically deny the signature.

22. From the evaluation of the evidence, the following facts can be drawn:-

- (a) That the deceased went to the home of PW3 on the material day;
- (b) That the accused was present at the home and on duty on the material day;
- (c) That the deceased did not leave the home and that her body was recovered in a bore-hole in the compound;
- (d) The injuries show that the deceased was seriously tortured before being thrown into the bore-hole; and
- (e) That the cause of death was asphyxia and drowning.

23. The confession of the accused was that he hit the deceased and carried her body into the well within the compound of his employer.

24. In his defence the accused denied the offence saying he did not know the deceased and that he did not take part in her murder. He also denied that he recorded the confession.

25. The evidence of PW9 and PW10 is sufficient to prove that the confession was recorded and was indeed voluntary. The defence of the accused was an afterthought for no such issue was raised in cross-examination of any of the witnesses.

26. The accused was not truthful in that he also denied knowing Joyce Warue. Yet, he told PW7 and PW10 that she is the one who killed the deceased and he only assisted her to do the killing and to carry the body to the water well.

27. The accused did not give an account of what he did and where he was on the material day. It was confirmed by his employer PW3 that he was on duty at his home and that he was assigned specific duties. PW3 said the accused did not do his duties on that day which was very unusual. I did not believe his defence in view of the evidence of the prosecution to the contrary and also taking into consideration the revelations of the accused during interrogation. All this evidence was well corroborated and crowned by the confession.

28. It was held in the case of **NDURYA VS REPUBLIC [2008] KLR 135** that:-

*Circumstantial evidence was often the best evidence as it was evidence of surrounding circumstances which by intensified examination was capable of accurately proving a proposition. However, circumstantial evidence was always to be narrowly examined. It was necessary, before drawing the inference of the accused person's guilt from circumstantial evidence, to be sure that there were no other co-existing circumstances which would weaken or destroy the inference. The circumstantial evidence in this case did not dislodge a lingering possibility that the offence may*

*have been committed by a person other than the appellant.*

29. In view of the foregoing decision, I am of the considered view that the facts outlined herein point the guilt to no other person but the accused. The only inference that can be drawn is that the accused is the one who assaulted and tortured the deceased before he threw her into the bore-hole. The postmortem report confirmed that the deceased was still breathing at the time she was thrown in the water.

30. It is my finding that the prosecution have proved to the standards required that the accused did the act that caused the death of the deceased.

31. The prosecution is also required to prove that the accused had the intention to kill.

Section 206 of the Penal Code provides:-

*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 the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;*

*(c) an intent to commit a felony;*

*(d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.*

32. The accused hit the deceased, tortured her and threw her in the well while still alive. The acts of the accused were indeed cruel and were intended to cause death or grievous harm to the deceased. The accused was found to be of a sound mental status and was therefore responsible for his actions. He thereafter understood very well the impact of the assault and the dumping of the helpless victim in the water well.

33. It was held in the case of **REPUBLIC VS NDALAMIA & 2 OTHERS [2003] KLR 638** that:-

*For the offence of murder, malice aforethought is deemed to be established by evidence showing knowledge that the act or omission causing death or grievous harm will probably cause death or grievous harm to some person whether that person is actually killed or not although such knowledge is accompanied by the indifference whether such death or grievous harm will occur.*

34. The doctor confirmed that the cause of death was asphyxia and drowning. This confirms that the act of the accused were intended and actually caused the death of the deceased.

35. I find that the prosecution have proved that the accused had malice aforethought as he caused grievous harm to her and eventually threw her into the water.

36. The prosecution have proved the offence of murder against the accused person contrary to Section 203 as read with Section 204 of the Penal Code and hereby so find. He is accordingly convicted of the offence.

37. It is hereby so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 15TH DAY OF FEBRUARY, 2017.**

**F. MUCHEMI**

**JUDGE**

**In the presence of:-**

**Ms. Nandwa for State**

**Ms. Muthoni for accused**

**Accused present**