



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAKURU**  
**CRIMINAL CASE NO. 60 OF 2006**

REPUBLIC ..... STATE

VERSUS

DANCUN KARIUKI KAMBO .....ACCUSED

**JUDGEMENT**

The accused **DUNCAN KARIUKI KAMBO** faces a charge of **MURDER CONTRARY TO SECTION 203 as read with SECTION 204 OF THE PENAL CODE**. The particulars of the charge were that:

***“On the 11<sup>th</sup> day of July, 2006 at Mairo Inya Trading Centre in Nyandarua District of the Central Province murdered CHARLES GITAU NDUNGU”***

The accused entered a plea of ‘**Not Guilty**’ to the charge. The case is an example of one of those unfortunate situations where a trial has been kept pending within the court system for an excessively long time. The accused was arraigned in court and charged in August 2006. It is only in August 2016 a full ten (10) years later that his trial was concluded. Several factors contributed to this delay and I deem it important at the outset to set down the history of this trial.

The trial kicked off on 25/5/2007 before Hon. Justice Luka Kimaru, in the presence of assessors as was by that time required by law. Hon. Justice Kimaru heard the evidence of three (3) witnesses.

In April 2008 **Mr. Olonyi** Advocate took over the conduct of the trial from **Mr. Momanyi**. Counsel sought time to appraise himself with the facts of the case. In December 2008 the accused expressed his dissatisfaction with the representation being offered by ‘**Mr Olonyi**’ causing Mr. Olonyi to withdraw from the matter. A third lawyer ‘**Mr Wachira**’ was appointed to act for the accused in May 2009.

At this point counsel for the accused filed a petition seeking the acquittal of the accused on the basis that the accused’s fundamental rights had been violated due to the detention in police custody for over 14 years. This petition continued to preoccupy the court until 24/5/2010 when the same was withdrawn by the accused and his lawyer.

In the mean time Justice Kimaru had been transferred from Nakuru High Court. The file was then taken over by **Hon. Lady Justice Mugo** and later by **Hon. Justice David Maraga** (as he then was). For a variety of reasons the case did not proceed for hearing between April 2008 up to June 2015.

On 30/1/2012 the matter came up before a fourth **Judge Hon Justice Anyara Emukule** who directed that

the hearing must proceed in the presence of the original assessors given that these original assessors had taken the evidence of one of the witnesses who had subsequently died. However it proved difficult to trace and avail these original assessors. Finally on 16/2/2014 **Hon Justice Roselyne Wendoh** (the 5<sup>th</sup> Judge to handle the case) directed that the trial commence *de novo* without assessors (as the law mandating the presence of assessors during murder trials had been repealed).

Unfortunately on 8/12/2014 **Hon Justice Janet Mulwa** (the 6<sup>th</sup> Judge to take over the file) reversed this direction and ordered that the original assessors be recalled. I took over the matter on 21/1/2015 as the 7<sup>th</sup> Judge to handle the case. I upheld the directions given by Hon Justice Wendoh that the trial proceeds without assessors and the trial commenced '*de novo*' before me on 23/6/2015. From the above narration it is evidence that this matter has had a very long and chequered history in the Nakuru High Court.

In the hearing before me the prosecution called a total of eight (8) witnesses in support of their case. **MR. BICHANGA** Advocate appeared for the accused.

**PW1 IRENE NYOKABI MACHARIA** told the court that on 11/7/2006 she was at her home in Nyahururu. One '**Peris**' who was a neighbour came running into the plot. She ran into the house of **PW1** and locked herself inside there. **PW1** then saw a man wielding a knife following behind Peris. The man entered into the house of the deceased (with whom this '**Peris**' was said to be cohabiting). **PW1** heard a commotion from inside the deceased house and then the accused emerged with blood on his shirt and trouser. The deceased also staggered out of his house and fell to the ground **PW1** saw that the deceased had a stab wound on his left side.

**PW2 PETER MUNYUI MBACHA** told the court that on the material day at about 11.00am he was seated outside his shop. He heard woman shouting from a plot apposite his shop. **PW2** ran to check what the problem was. The women informed him that one of their neighbours had been stabbed. The accused then boarded a bicycle and rode off. **PW2** and others gave chase. A stone was thrown at the bicycle and the accused fell down. He was apprehended by the mob who began to beat him. **PW2** rushed back to the plot and assisted to take the injured man to a nearby hospital. The victim unfortunately succumbed to his injuries whilst undergoing treatment. The incident was reported to police.

**PW4 SUPT. ESTHER NDUTA MUHORO** told the court that on 11/7/2006 at about 11.30am one '**Peris**' came to Nyahururu Police Station to report that her current husband had been attacked by accused who was the former husband of this '**Peris**'. **PW4** went to the scene with other officers. Upon arrival they found the accused nursing injuries which had been inflicted upon him by the irate mob. The victim of the attack was not at the scene having already been rushed to Nyahururu District Hospital. **PW4** entered the house of the deceased and found blood all over the floor. She removed the blood stained clothes of the deceased outside the house as well as a blood stained knife. **PW4** took possession of the knife and produced it in court as an exhibit. **P. Exb 1** together with a blood stained jacket **P. Exb 2**.

Police took up the investigation of the matter and finally the accused was brought to court on this charge of murder.

At the close of the prosecution case the accused was found to have a case to answer and was placed onto his defence. The accused gave a (sworn) defence in which he denied any and all involvement in the death/murder of the deceased. This court must now evaluate the evidence on record with a view to determining whether the charge of murder has been proved beyond reasonable doubt.

The offence of murder is defined by section 203 of the Penal Code, Cap 63 Laws of Kenya thus:-

***"203 Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder"***

Flowing from this definition the prosecution is required to adduce evidence to prove beyond reasonable doubt the following crucial ingredients of the offence of murder

(i) The fact of death of the deceased

(ii) The cause of that death

(iii) Evidence to prove that the deceased met his death as the result of an unlawful act or omission on the part of the accused

(iv) Proof that said unlawful act or omission was committed with malice aforethought.

On the fact of death of the deceased there can be no controversy. **PW1** and **PW2** both testified that they saw the deceased lying mortally injured in the plot having a stab wound to his side. **PW3 MICHAEL WACHIRA** told the court that upon receiving news of the attack on the deceased, he accompanied a brother of the deceased to the mortuary where they found the dead body. All these witnesses who knew the deceased will identify him as '**Charles Gitau Ndungu**'.

Evidence regarding the cause of death was tendered by **PW5 DR. JOSEPH KIRIMI KINYUA** who produced the post-mortem report in respect of the autopsy conducted on the body of the deceased. The doctor noted a cut wound on the right side of the body, collapsed lung and fractured ribs. **PW6 DANIEL KIRAGU** was the Scenes of Crime Officer who visited the scene. He took four (4) photographs of the body of the deceased, which photographs were produced as exhibits **P. Exb 5**. The photographs clearly show a cut penetrating wound on the side of the body. The cause of death was opined to be '**shock due to severe bleeding, multiple rib fracture and torn diaphragm**'. Under cross examination by '**Mr. Bichanga**' **PW5** stated that the cut wound was likely due to a sharp object such as a knife. This was expert medical evidence. It was neither challenged nor controverted by the defence. I therefore find as a fact that the deceased met his death due to being stabbed in the side.

Having proved the fact and cause of death, the prosecution is required to go further and prove by way of evidence that the accused committed the act or omission which led to the death of the deceased.

In this case the key witness was this lady known as '**Peris**'. She was said to be the wife of the deceased but had previously cohabited with the accused. Although '**Peris**' testified in the initial trial before **Hon. Justice Luka Kimaru** by the time I took over the hearing in June 2015, the said Peris was said to have passed away and was no longer available to testify. No application was made by the prosecution to introduce her written statement as evidence in this case. Be that as it may, the absence of this witness is not necessarily fatal to the prosecution case. What the court needs to consider is whether the totality of the evidence adduced is sufficient to prove the charge.

**PW1** was an eye witness who was present when the incident occurred. She told the court that on 11/7/2006 she was at home in Maili Nne in Nyahururu. She was engaged in the task of spreading out beans to dry. **PW1** said she saw her neighbour Peris '**the wife of Ndungu (the accused)**' and another neighbour leave for the river to fetch water suddenly '**Peris**' came rushing back, ran into the house of **PW1** and locked herself inside there. Then **PW1** saw a man wielding a knife whom she identified as the accused come and hit the door of the deceased. The deceased at the time was inside his house. The man barged into the house of the deceased and **PW1** heard a commotion from therein. Peris meanwhile who was weaving came out of the house of **PW1** and went to the police.

The next thing **PW1** saw was accused emerge from the deceased's house with blood on his clothes. The deceased also staggered out of his house having been fatally wounded and fell to the ground.

The evidence of **PW1** is corroborated by **PW2** who told the court that on the material day as he sat outside his shop, which was opposite the plot where the incident occurred, he heard women shouting. He rushed across to check what the problem was. He was told that an occupant of the plot had been stabbed and he saw the accused trying to escape on a bicycle. The crowd stoned the bicycle and accused fell down. The mob immediately set upon him beating him. **PW2** confirms that he saw the deceased whom he knew as '**mrefu**' lying outside his house with a stab wound to the left side. **PW2** and others got a vehicle and rushed the deceased to Nyahururu District Hospital where he succumbed to his injuries and died

whilst undergoing treatment.

**PW1** identifies the accused as the man whom she saw wielding a knife barge into the deceased's house. **PW1** further identified the accused as the man who a few moments later emerged from the house of the deceased with blood on his clothes. **PW2** also positively identified the accused as the man whom he met trying to escape from the scene on a bicycle. The incident occurred at 11.30 am. It was broad daylight and visibility was good. The accused was apprehended there and then. At no time did the witnesses lose sight of him. Both witnesses gave clear, cogent and consistent evidence and both remained unshaken under a lengthy and intensive cross examination by defence counsel. There is eyewitness testimony placing the accused at the scene of the incident.

Although neither **PW1** nor **PW2** actually saw the accused plunge the knife into the body of the deceased, the circumstantial evidence points squarely at the accused person.

In Wills on 'Circumstantial Evidence' 6<sup>th</sup> Edn P.311 it was stated as follows:

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

In the case of **REPUBLIC Vs WEAVER & DONOVAN [1928] Cr. App R 20** it was held that:

***"Circumstantial evidence is often the best evidence. It is evidence of surrounding circumstances which, by intensified examination, is capable of providing a proposition with the accuracy of mathematics. It is no derogation of evidence to say it is circumstantial"***

Here we have a case where the accused is seen storming into the plot, wielding a knife. He barges into the room occupied by the deceased, a commotion is heard, accused immediately emerges from the same room carrying a blood stained knife and the deceased staggers out behind him mortally wounded and falls to the ground.

The deceased was alone in his room as his wife had run to hide in the room of **PW1**. No other person was seen entering the deceased's room. There can be no other logical conclusion from this set of facts other than that it was accused who fatally stabbed the deceased.

Aside from this evidence of visual identification of the accused at the scene, there exists clear evidence of identification of the murder weapon. **PW1** described the knife which she saws the accused carrying thus

***"The knife was not an ordinary kitchen knife"***

**PW4** told the court that when she visited the scene she recovered a blood stained knife outside the house of deceased. This knife had most probably been dropped there as the accused escaped. **PW4** on her part describes the knife she recovered in the following terms

***"The knife was a dagger it was not an ordinary kitchen knife...."***

The knife in question was exhibited in court **P. Exb 1**. I myself noted that it was not a kitchen knife but was more like a dagger.

The knife was submitted to the Government Chemist for analysis. **PW7 DR. STEPHEN MATUNDE MAIBE** an Assistant Government Chemist based in Nairobi testified that he did examine and analyse that knife together with the other exhibits. His finding was that the blood stains on the knife and those on the deceased's clothing were all of blood of **Group 'B'**. This was the blood group of the deceased. Therefore this proves that this knife was indeed the weapon used to kill the deceased.

After attacking the deceased the accused did attempt to flee from the scene on his bicycle. This attempt

was thwarted by members of public who stoned the bicycle causing it to topple over and accused to fall down. The accused was immediately apprehended. He was caught at the scene and at no time did the witnesses lose sight of the accused.

**PW4** confirms that when she arrived at the scene she found the accused had been caught and beaten by the mob. **PW4** re-arrested accused and searched him. She told the court that she found the sheath of the dagger attached to the accused's belt. This reinforces the evidence that it was the accused who had the knife in question.

In his defence the accused denies that he went to the deceased's house and stabbed him. The accused concedes that '**Peris**' was at one time his wife but states that they had parted ways one month prior to the incident. The accused denies that he was ever apprehended and beaten by a mob. The accused claims that on the material day he was drunk and was riding his bicycle when he fell off and injured himself. This defence is clearly a fabricated afterthought. At no time did the accused in cross examination put his version of events to any of the witnesses. **PW1** and **PW2** had no grudge against the accused. They had no reason or motive to lie against him. For these reasons, I reject the accused's defence.

From the evidence on record I am satisfied that it has been proved that it was the accused who fatally stabbed the deceased. The *actus reus* for the offence of murder has been satisfactorily proved against the accused .

The final ingredient requiring proof in a murder charge is that of '**malice aforethought**' which forms the '**means rea**' of the offence. Section 206 of the Penal Code defines malice aforethought in the following terms

***“206 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) .....***

***(c) .....***

***(d) .....*”**

In this case the intention of the accused is very clear from his actions. The accused stormed into the plot, armed with a knife, went directly to the house of the deceased, stabbed him and left. This attack on the deceased was totally unprovoked. It was a pre-meditated attack. The accused went to the plot ready and armed. He knew exactly who his target was. I have no doubt that the attack was preconceived. It was not an act done on the spur of the moment or due to any provocation.

It was alleged that the accused may have harboured anger against the deceased because his '**Peris**' (His wife) had left him and moved to cohabit with the deceased. This is not an excuse to launch an unprovoked attack on the deceased. The accused did not find deceased and Peris together in the same house. I find that the accused's clear intention was to kill or to cause grievous bodily harm to the deceased. Malice aforethought in terms of Section 206(a) of the Penal Code has been proved.

Finally I am satisfied that this charge of murder has been proved beyond reasonable doubt and accordingly convict the accused.

**Dated in Nakuru this 9<sup>th</sup> day of December, 2016**

Mr. Orege holding brief for Mr. Bichanga.

**Maureen A. Otero**

**Judge**