



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**HIGH COURT CRIMINAL CASE NO 114 OF 2014**

**REPUBLIC .....PROSECUTOR**

**VERSUS**

**GEORGE GICHEHA GATHOGA .....ACCUSED**

**JUDGMENT**

1. The accused **GEORGE GICHEHA GATHOGA** was charged with the offence of murder contrary to **Section 203** as read with **Section 204** of the Penal Code Cap 63 Laws of Kenya the particulars of which were that on the 30<sup>th</sup> day of November, 2014 at Kiwanda village Thigio location Limuru Sub County within Kiambu County unlawfully murdered **SALOME WAMBUI KARIUKI**.

**FACTS AND PROSECUTION CASE**

2. Brief facts of the prosecution case was that on the night of 29<sup>th</sup> November, 2014 the accused infant child became sick with a fever from which she was rushed to Tigoni hospital where she was pronounced dead. The next morning the deceased came to offer her condolences to the accused on the death of his child on the morning of 30<sup>th</sup> November, 2014 and the accused suddenly took out a panga and cut the same on an allegation that she had bewitched the child causing her fatal injuries.

3. **PW1 ESTHER NJERI KIOI** testified on oath and stated that upon their arrival back home from the hospital through Tigoni police station the deceased who was an Aunt to the accused came to condole with them when the accused took out a panga and cut her on the head and the hands accusing her of having bewitched the child and therefore should not have come to offer her condolences. It was her evidence that when PW2 came to their home the accused wanted to attack him also. It was her evidence that the relationship between the accused and the deceased was very cordial and that she did not hear any conversation between the deceased and the accused before the attack.

4. **PW2 WILFRED GATHUGA KIMAI** testified that upon receipt of the information on the death of the accused's infant child he advised them to make a report at Tigoni Police station and thereafter bring the body home for burial. He confirmed that he was the first to get to the accused house upon their arrival with the body and that on his way back to his house he met the deceased whom he left with the accused talking, shortly thereafter he heard the cry of the deceased. He together with the taxi driver who had brought the body home tried to disarm the accused who turned against them.

5. It was his evidence that after the accused had been disarmed by PW3 he kept on crying about his child whom he claimed had been killed. It was his evidence that there was a time when the accused had been

treated for typhoid and malaria and that he heard the accused say that the deceased had bewitched his child. This evidence was corroborated by **PW3 SHADRACK KIMANI** who disarmed the accused and locked him in his house before he was arrested.

**6. PW4 PETER KARIUKI KIMANI** confirmed having found the body of the deceased who was his wife lying at the door steps of the accused house while **PW5 Cpl. THOMAS K. LANGAT** confirmed having arrested the accused and recovered the murder weapon and that when he talked with the accused person he told him that the deceased had been suspected of bewitching his child. **PW7 ERICK NGUGI GITAU** the Area Chief confirmed having received a report from members of the public on the murder.

**7. PW8 CPL. FRANK ANUNDA** a scene of crime officer testified and produced the photographs that had been taken at the scene. He further testified that there was an allegation that the deceased was a witch and had bewitched the accused child while **PW9 Dr. PETER NDEGWA** confirmed the cause of death and produced the post mortem report thereon. **PW10 LAWRENCE KINYUA MUTHURI** Government Analyst confirmed that the blood stains on the panga matched those of the deceased. **PW11 Cpl. FELIX KIGUN** went to the scene and recovered the exhibits which he forwarded to the Government chemist and recorded statements from witnesses which he forwarded to the office of Director of Public Prosecutions. It was his evidence that he talked to the accused person who denied being responsible for the killing of the deceased.

### **DEFENCE CASE**

8. When put on his defence, the accused testified on oath that he had taken his sick child to the hospital on 30/11/2014 where it was pronounced dead. It was his evidence that from there he only found himself at the police station and could not remember what happened thereafter. It was his evidence that the following day he found himself in court and that he had no reason to kill his aunt, the deceased.

### **SUBMISSIONS**

9. At the close of the defence case it was submitted by Mr. Wamwayi on behalf of the accused that the same had no recollection of what had happened on the material day. It was submitted that PW2 had told the court that the accused had suffered an attack of cerebral malaria at some stage and had been treated but he could not understand why the accused acted like he did. It was therefore submitted that the accused had not planned to attack the deceased and only reacted spontaneously and came as a result of losing his mind which brings the behavior of the accused to that of temporary insanity.

10. It was submitted that for an offence of murder to be proved there must be proof of malice aforethought. It was submitted further that the action of the deceased was that of hysteria and going mad which can only be attributed to loss of mind since there were no differences between the deceased and the accused. The court was therefore urged to treat the case as that of temporary insanity.

11. On behalf of the prosecution, it was submitted that the accused armed himself and cut the deceased claiming that she had bewitched his daughter. It was submitted that the P3 form produced by the prosecution confirmed that the accused was fit to stand trial. It was submitted that the accused defence was that of selective amnesia and an afterthought.

### **ANALYSIS AND DETERMINATION**

12. Under Section 203 of the Penal Code murder is defined as follows:-

***“Any person who of malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder.”***

To sustain a conviction in a charge of murder the prosecution must therefore prove beyond reasonable doubt the following:-

- a) The death of the deceased and the cause thereof.
- b) That the accused person committed the unlawful act which caused the death and
- c) That the accused person had malice aforethought.

13. The fact and the cause of death of the deceased is not in dispute. PW1, PW2, PW3, PW4 and PW7 all testified and confirmed the death of the deceased person and the cause thereof. They all found the deceased lying outside the door of the accused house with a cut on the head and hands. This evidence was corroborated in material particularly by the evidence of **PW9 Dr. NDEGWA PETER** who performed post mortem examination on the body of the deceased and produced the post mortem report as P.Exhibit No. 4 confirming that the deceased had the following injuries:-

- a) Deep cut wound back of the neck reaching the spinal column
- b) Head decapitated via a deep cut wound right lateral.
- c) Two incisive wounds left frontal face
- d) Left hand amputated above the wrist joint
- e) Deep incisive wound right.
- f) Deep hand (palmer aspect) cut left elbow area.

He formed an opinion that the cause of death was exsanguinations due to multiple cut wounds due to sharp force trauma.

14. There is also evidence unchallenged that the said injuries that resulted to the death of the deceased were caused by the accused person. PW1 Esther Njeri testified that when the deceased came to their compound the accused who was outside the house went back into the house and took a panga and by the time when she followed him outside he had cut the deceased. PW3 found the deceased lying down with the accused armed with a panga and he managed to take away the panga from the accused. I therefore find and hold that the said injuries and subsequent death was caused by the accused person.

15. The only issue for determination by the court is whether the said death was caused by malice aforethought. The accused in his defence stated that on the material day he called his cousin who was a bodaboda rider to take his then sick child to the hospital who was pronounced dead upon arrival and that from that time he only found himself at the police station and does not remember what happened before then. He stated that when he was in class eight, he had a mental problem and was treated for cerebral malaria and therefore did not remember any reason that would have lead him to kill his aunt.

16. Under cross examination he stated that he does not remember what happened to the deceased. He stated that he could remember how his child was unwell and he took her to the hospital but did not know what caused her death. At the close of the defence case the accused submitted that he must have suffered temporary insanity.

17. This therefore raises the issue as to whether the prosecution proved beyond reasonable doubt that the accused killed the deceased with malice aforethought and whether the defence of temporary insanity was available to the accused person. It is trite law that the accused person assume no responsibility to prove his innocence, and where however an accused assumes one of the statutory defences of provocation, insanity or other similar defences such as intoxication, the burden does not shift upon the accused, the court must consider whether there is cogent evidence, the existence or otherwise of any of these defences. To establish the defence of insanity the court must clearly be satisfied that when the accused committed the act of which he is indicted, he was (i) suffering from a disease which could affect his mind and by reason thereof (ii) he was incapable of understanding what he was doing or knowing that he ought

not to do the act or make the omission of the intention to do so.

18. To establish a defence on the ground of insanity it must be clearly proved that at the time of committing the act the party accused was labouring under such defect of reason from a disease of mind not to know the nature and quality of the act he was doing or if he did know it, that he did not know what he was doing was wrong as per the provisions of **Section 12** which must be read together with **Section 9(i)** of the Penal Code.

**19. Section 11** of the Penal Code provides that every person is presumed to be of sound mind at any time which comes in question until the contrary is proved. It therefore follows that where an accused person raises the defence of insanity the burden of proving insanity rests with him on a balance of probability See **MARRI v Republic [1985] KLR 710 and Muswi s/o Musele v Republic [1956] EAC 622.**

20. In this matter PW2 testified that when the accused was locked in his house having been disarmed, he kept on crying about his child saying that his child had been killed and that this made him conclude that the same was not of sound mind and that previously when the accused was in class eight (8) he had suffered from typhoid and Cerebral malaria from which he was allegedly taken to Mathare mental hospital. It was his further evidence that the accused had been treated well at Kenyatta National Hospital and had never been taken to Mathare since then.

21. PW2 further stated that before he left the compound of the accused he had left him with the deceased and that he heard the accused say that the deceased had bewitched his child. This evidence was corroborated by PW1 who stated that the accused had said that the deceased had bewitched his child and should not have therefore come to condole with him before cutting her. The accused in his defence only stated that he did not know and could not remember what happened.

22. From the evidence tendered, it is clear that the accused person was in total control of his mind, he knew that his child was dead and was therefore at the time conscious of the nature of his act, the accused did not attack the deceased spontaneously, having spoken with her and accused her of having bewitched his child, the accused went into his house where he took the murder weapon and the ferocity of the attack to my mind reflect the vengeful mood of the accused and the anger against the deceased whom he believed had bewitched his child and would therefore dismiss the accused defence herein.

23. From the totality of the evidence presented I find and hold that the accused attacked the deceased with malice aforethought and that the prosecution proved its case against the same beyond reasonable doubt and hereby find the same guilty and convict him of the murder of Salome Wambui Kariuki.

DATED, SIGNED and DELIVERED at Nairobi this **7<sup>th</sup>** day of **March**, 2017.

.....

**J. WAKIAGA**

**JUDGE**

**In the presence of:-**

*Mrs. Kinoti for the State*

*Mr. Wamwayi for the Accused*

*Accused present*

*Tabitha court clerk*