



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CRIMINAL CASE NUMBER 10 OF 2013**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**MARY NDINDA MUTISYA.....ACCUSED**

**JUDGEMENT**

Mary Ndinda Mutisya, hereinafter “the accused” is charged with murder contrary to Section 203 as read with Section 204 of the Penal Code. It is alleged that she murdered J. M. N., hereinafter “the deceased” on 8<sup>th</sup> day of January 2013 at Makaburinin area within Kawaida Village in Kiambu County. She has denied committing this offence. Mr. Solomon Wamwayi, advocate, is representing her.

The offence of murder is defined under Section 203 of the Penal Code in the following terms:

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

The prosecution bears the burden of proving murder beyond reasonable doubt. The prosecution must prove the unlawful or guilty act (*actus reus*) by the accused that led to the death of the deceased. The prosecution must also prove guilty mind (*mens rea*) on the part of the accused. These are the two main ingredients that must be proved beyond reasonable doubt before an accused person can be found guilty of the offence of murder.

Lord Denning in **Miller v. Minister of Pensions [1947] 2 All ER372** discusses the phrase “*proof beyond reasonable doubt*” thus:

***(T)hat degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond a shadow of doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with a sentence ‘of course it is possible but not in the least probable’, then the case is proved beyond reasonable doubt, but nothing short of that will suffice.***

It is the duty of this court to carefully examine and analyze all the evidence adduced in support of the prosecution case to determine whether it meets this threshold of proof beyond reasonable doubt.

Eight witnesses have testified in support of the prosecution case. Two of them testified before my predecessor Hon. Lady Justice Florence Muchemi. The first witness is Anthony Kamau (PW1) the Assistant Chief of Kawaida Sub-Location in Kiambu. He testified to how he received information from

Kawaida Police Post about a murder of a child at Makaburini Village in his Sub-location. This was about 11.00am on 8<sup>th</sup> January 2013. He went to the place and found the body of a boy with deep cut wounds on the head and neck. He learned that the child was the son of one W. and that a woman neighbour of W. had killed the boy. He took a blanket from the house of the boy's father and covered the body. He then started looking for the suspect. He found her hiding at a corridor in the vicinity. PW1 locked her inside a house in the area and called the police.

The second witness to testify before Hon. Muchemi was B. B. W. (PW2). He is the father of the deceased boy. He told the court that on 8<sup>th</sup> January 2013 at around 11.00am he was in his house at Kawaida Village sleeping when he received information from Mutisya's son that his (B's) son known as J. M. had been killed. He went outside and found his son lying on the ground bleeding. He picked him but the boy died shortly thereafter.

I took over the proceedings in this case on 13<sup>th</sup> November 2014. Directions were given to proceed from where Justice Muchemi had reached. I received evidence from the remaining six witnesses and the defence of the accused.

CPL Fauzia Daudi (PW3) and PC Mwanaidi Hussein (PW4) both from Karuri Police Station testified that upon receiving information of the murder they went to the scene at Kawaida Village where they found the accused locked in a house. They took her in custody. Both witnesses testified that the accused was wearing a blood-stained skirt. The skirt, white and black flowered, was identified in court by the two officers as the one the accused was wearing when they saw her. It was produced in evidence as Exhibit 1. The accused was taken to Karuri Police Station and the skirt she was wearing was retained by the police.

The case was investigated by Sergeant Gabriel Rotich (PW5) from Kiambu Divisional CID Office. He testified that during his investigations the accused led him and CPL Rebecca (not a witness) to the scene and that at about 70 metres away from the scene the accused showed him a panga hidden in a thicket in a gully.

The remaining witnesses are Dr. Joseph Kagunda Kimani (PW6) a Government Analyst who examined the skirt (Ex. 1), panga (Ex. 3) and blood samples from the deceased and the accused; CPL Frank Anunda (PW7) the scenes of crime officer who took photographs of the scene and Dr. Peter Ndegwa (PW8) the pathologist who examined the body of the deceased. The report from Dr. Maundu who examined the accused person and certified her fit to stand trial was produced in evidence (Ex. 8) by Sergeant Rotich (PW5).

The court placed the accused on her defence after satisfying itself that she was implicated in the murder of the deceased. She gave her evidence without taking oath. She told the court that on 8<sup>th</sup> January 2013 she was in her house when a man attempted to forcefully enter her house claiming that the accused has been complaining to the police that the man had assaulted her. She said that the man threatened to kill her. She said that the man pulled a panga and the accused, sensing danger, started running intending to go to the police station. She said that she could not out-run the man and he caught up with her and a struggle ensued at a place with many children playing; that the man started beating her using the flat sides of the panga; that she tried to snatch the panga from him; that the man could not let go of the panga; that he hit her with a fist and she fell down holding the panga and that one of the children was injured by the panga and died. She denied killing anyone and told the court that she did not plan to kill the child.

CPL Frank Anunda (PW7) exhibited in court 18 photographs taken at the scene of murder. They are gory. This court observed that the injuries which are severe are localized on the head and neck. It is difficult to understand how a human being could inflict such injuries to a child.

Dr. Peter Ndegwa, who examined the body of the deceased, described the injuries as follows:

- i. Incisive wound parietal scalp measuring 10 cm long.

- ii. Incisive wound occipital scalp 6 cm long.
- iii. Incisive wound occipital scalp 5 cm long.
- iv. Incisive wound nape of neck 6 cm long.
- v. Incisive wound occipital scalp 5 cm long.
- vi. Incisive wound occipital scalp 5 cm long

The doctor also found multiple depressed skull fractures corresponding to the incisive wounds; subcutaneous contusions occipital and parietal scalp; parietal dura incised intracranial haemorrhage. The opinion of the doctor was that death resulted from severe head injury due to sharp force trauma. The injuries described by PW1 and PW2 and captured in the photographs produced in court as Exhibits 5(a) to 5(r) are consistent with the injuries confirmed by the pathologist after examining the body of the deceased. This court harbours no doubt that the deceased died as a result of injuries suffered as a result of an attack by a sharp weapon. I also harbour no doubt that the death of the deceased was caused by an unlawful act. He was slashed by a sharp object on several parts of his head. The cuts are deep and are localized at the occipital region of his head and nape of his neck. The person who caused those injuries intended to cause grievous harm or to kill the deceased no less. There is no other explanation. The weapon used was repeatedly applied on the poor child on the same area, the head which is a vulnerable part of the body.

PW2 told the court that Mutisya's son informed him that his son had been killed. PW2 did not specify whether the Mutisya in reference is the accused person or another Mutisya. Be that as it may, this son of Mutisya was not called as a witness. No neighbour was called to testify. There is no eye witness on what happened. The evidence against the accused is therefore to a large extent circumstantial. Forensic examination of the skirt worn by the accused on the day of this offence implicates the accused person. The evidence of the police officers, CPL Fauzia and PC Mwanaidi, is that they rescued the accused from the house in which PW1 had locked her to save her from the irate mob who wanted to lynch her. The two officers found the accused wearing a skirt that had blood stains on the front part. They took into possession this skirt. It was later handed over to PW5 the Investigating Officer.

Evidence further shows that the accused led the Investigating Officer to recover the panga suspected to be the murder weapon from a thicket in a gully about 70 metres from the scene. Further evidence shows that the accused was in hiding after the incident. PW1 found her in a corridor near the house of one Laban Njoroge in Makaburini Village. He locked her in a house and called police.

In her defence, the accused admits having been at the scene. She however said that the panga fell on the deceased as she and deceased's father were struggling over it. PW2 denied that the deceased was injured by a panga as they struggled over it with the accused. PW2 denied during cross-examination that he sought sexual favour from the accused nor did he go to her house armed with a panga intending to rape her. He also denied that he fought with the deceased.

The Court of Appeal in **Neema Mwandoro Ndurya v. Republic (2008) eKLR** had this to say in reference to circumstantial evidence:

***“It is true that circumstantial evidence is often the best evidence as it is evidence of surrounding circumstances which by intensified examination is capable of proving a proposition with the accuracy of mathematics as was said in R. V. Taylor Weaver and Donovan (1928) 21 Cr. App. R. 20.”***

Circumstantial evidence must however be examined closed before relying it as bases for conviction. In **Teper v. R [1952] AC at p.489**, cited with approval by courts in this country, Lord Norman stated thus:

***“Circumstantial evidence must always be narrowly examined, if only because evidence of this***

***kind may be fabricated to cast suspicion on another..... 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."***

I have carefully examined the evidence before the court including the defence of the accused. To start with, this court is alive to the legal principle that the accused has no legal duty to prove her innocence. The prosecution bears the onus of proving the accused guilty. As stated above in this judgement, I find the fact of unlawful death of the deceased proved beyond reasonable doubt. The only issues remaining unresolved are whether the accused caused the death of the deceased and whether she had formed the intention to cause it. The accused in her defence does not deny she was at the scene. Her evidence that she struggled with PW2 and in the course of that struggle the panga they were struggling over fell on the deceased and fatally injured her is incredible. One only needs to look at the injuries suffered by the deceased to discredit that evidence. In my view the injuries were caused by a deliberate action of someone who was ready to inflict death or grievous physical harm to the victim. The prosecution says that person is the accused person and I believe that this is so.

The accused was found hiding by PW1. PW1 had to lock her up in a house to stop the public from attacking her. She was found wearing a skirt that was spotted with blood stains. She led police to recover a panga from a thicket in a gully about 70 metres from the scene. The panga had been hidden and she is the one who led police to its recovery. This panga and the skirt she was wearing were subjected to forensic examination. They were found to be moderately stained with human blood. This blood was examined and profiled for DNA. The results were compared with DNA profiled from the blood sample drawn from the deceased. The results matched. Dr. Joseph Kagunda Kimani (PW6) confirmed that the blood found on the panga and on the skirt belonging to the accused belonged to the deceased. My conclusion on this matter is that the panga came into physical contact with the deceased and blood from the deceased must have splashed on the skirt worn by the deceased in the course of the attack on the deceased.

My examination of the above forensic evidence and the circumstances of this case as discussed in this judgement leaves me satisfied that there are no other co-existing circumstances that would weaken the inference of guilt on the part of the deceased.

What was the motive behind accused's actions? The prosecution did not tender evidence to show motive. The Investigating Officer told the court that the accused had told him of a quarrel with PW1 in September 2012. The reason for this quarrel is said to be the beating of the accused and her son by PW2. The accused did not testify to this. In fact she just mentions of a man who attacked her. In all her evidence in defence she never gave the name of the man she was referring to nor did she identify that man as PW2. I am alive, as stated above, that she has no legal obligation to prove her innocence. However, she has testified and the law requires this court to consider all the evidence on record. Was the accused motivated to kill the deceased due to a long standing dispute between her and PW2? I have no evidence to this and I can only either speculate or believe what the accused told the Investigating Officer.

It is my conclusion that I do not believe the defence of the accused. The injuries of the deceased were not caused by an accidental fall of a panga as the accused and the deceased struggled over it. In my view those injuries were caused by a deliberate action of the accused who had made a decision to kill the boy or to the very least to cause grievous physical injury. I will and do hereby reject the defence of the accused and find that she deliberately inflicted multiple blows to deceased's head causing multiple injuries and fractures of the skull. That boy need not have met such a painful death whatever grievances the accused might have had with the boy or his father.

Mr. Wamwayi submitted that the deceased had no intention to kill the boy and asked the court to treat the incident as an accident. He asked this court to reduce the offence to manslaughter. I am not able to agree with him. As stated elsewhere in this judgement the injuries sustained by the deceased were caused by a deliberate action on the part of the accused. It matters not that there was a dispute between the accused and PW2 the boy's father, if indeed such dispute existed. I find the offence of murder proved against the accused beyond reasonable doubt. Consequently I hereby enter conviction against the accused Mary

Ndinda Mutisya for murder contrary to section 203 as read with section 204 of the Penal Code. Orders shall issue accordingly.

**Dated, signed and delivered in open court this 2<sup>nd</sup> day of March 2017.**

**S. N. Mutuku**

**Judge**