



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAKURU**  
**CRIMINAL CASE NO. 57 OF 2011**

REPUBLIC.....PROSECUTOR

VERSUS

DAVID MWANGI KITONGA..... ACCUSED

**JUDGMENT**

The accused **DAVID MWANGI KITONGA** 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 7<sup>th</sup> day of July 2011 at [particulars withheld] Mariakani area in Nakuru District within Nakuru County murdered MWM”*

The accused entered a plea of ‘**Not Guilty**’ to the charge. The trial initially commenced before **Hon. Justice Anyara Emukule** (retired) who recorded the evidence of one (1) witness. Following the transfer of the Hon. Judge to Mombasa High Court, I took over the case. The accused in exercise of his right under Section 200(3) of the Criminal Procedure Code elected to have the case begin de novo.

The trial started a fresh before me on 23/7/2015. The prosecution led by learned State Counsel called a total of six (6) witnesses in support of their case. **MS WANJIKU** learned Counsel acted for the accused.

The brief facts of the prosecution case were as follows. The accused was the husband of the deceased. **PW1 EWN** the mother of the deceased informed the court that the couple had previously disagreed and had separated for a period of about eight (8) years. The accused took her children and returned to live with her mother in Keringet. Sometime later the couple reconciled and the accused together with her children returned to live with the accused in Mariakani.

On 7/7/2011 **PW1** told the court that she tried to contact the deceased on her mobile phone but failed to raise her. **PW1** called the accused to enquire about the whereabouts of his wife. The accused told her that the deceased had gone to the market to sell her waves.

**PW2 E W M** is the daughter to the accused and the deceased. She confirmed that they initially lived with their grandmother (**PW1**) but her parents later reconciled and the deceased returned with her children to live with accused in Mariakani.

On 6/7/2011 **PW2** stated that when she woke up to prepare for school her mother was not in the house. **PW2** told the court that upon enquiring about her mother the accused informed her that, she had gone to

the market. **PW2** found this odd as the stock of clothes which deceased used to sell were still in the house. **PW2** phoned her grandmother **PW1**.

After the deceased had been missing for a couple of days **PW1** advised the accused to report the matter to police which he did some days thereafter the body of the deceased was found partially buried in the adjacent plot. The body was dressed only in its underwear and had partially decomposed. Police were called in and they came and took the body to the mortuary where an autopsy was conducted. Police launched investigations into the matter after which the accused was arrested and charged with the murder of the deceased.

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 elected to keep silent and not to make any statement in defence. This court must now analyze the evidence on record and determine whether the charge of murder has been proved beyond reasonable doubt.

Section 203 of the Penal Code Cap 63, Laws of Kenya defines the offence as murder 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”***

From this definition derive the four ingredients of the offence of murder all of which must be proved beyond reasonable doubt.

- (i) Proof of the fact of the deceased’s death
- (ii) Proof of the cause of that death
- (iii) Proof that the deceased met her death as the result of an unlawful act or omission on the part of the accused – this forms the **‘actus reus’** of the offence of murder
- (iv) Proof that said unlawful act or omission was committed with malice aforethought – this forms the **‘mens rea’** of the offence.

In this case the fact as well as the cause of death of the deceased have been readily proved. **PW6 CHIEF INSPECTOR BONIFACE MUTEI** was one of the officers who went to the scene and recovered the skeletal remains of the deceased. **PW1** the mother of the deceased and **PW4 JMN** a brother of the deceased both identified the remains to the doctor before the doctor autopsy was conducted. Both **PW1** and **PW4** identified the deceased as **‘MWM’**

Evidence regarding the cause of death was tendered by **PW3 DR. TITUS NGULUNGU** a consultant pathologist based at PGH – Nakuru, who performed the autopsy on the body of the deceased. **PW3** told the court that the body was partially decomposed and infested with maggots. He noted an oblique incision across the front of the neck and the trachea was partially dissected. **PW3** formed the opinion that the cause of death was **‘massive blood loss due to neck vessel injuries arising from a sharp force trauma’**. The doctor filled and signed the post-mortem report which was produced as an exhibit **P. Exb 1**. There can therefore be no doubt that the deceased met her unfortunate death due to her neck being slit

Having proved the fact as well as the cause of death of the deceased, the prosecution must go further and tender evidence to show that it was the accused who so slit the neck to the deceased and caused her death.

There was no witness to the events leading up to the death of the deceased. Nobody saw the accused attack and assault the deceased in any manner whatsoever. Even **PW2** the deceased’s daughter who lived in the same house as her parents has no idea what happened to her mother. She never saw or heard any quarrel or commotion between the accused and the deceased the night before the deceased went missing.

The prosecution therefore seeks to rely on circumstantial evidence as a basis for implicating the accused in this murder. Circumstantial evidence is evidence which though not direct points at the accused as the perpetrator of the offence. **In REPUBLIC Vs WEAVER & DONOVAN [1928] 21 Cr. App R. 20** it was held

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

In **KARIUKI KARANJA Vs REPUBLIC [1986] KLR** the court held that

***“In order for circumstantial evidence to sustain a conviction, it must point irresistably to the accused and in order to justify the inference of guilt on such evidence the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt. The burden of proving facts justifying the drawing of that inference is on the prosecution”***

Finally on this point in **JUDITH ACHIENG OCHIENG Vs PUBLIC [2009]eKLR** the Court of Appeal sitting in Kisumu held as follows

***“It is settled law that when a case rests entirely upon circumstantial evidence, such evidence must satisfy three tests***

***(i) The circumstances from which the inference of guilt is sought to be drawn must be cogently and firmly established***

***(ii) Those circumstances should be of a definite tendency unerringly pointing towards the accused***

***(iii) The circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else”***

The basis for the evidence against the accused is that he was the husband to the deceased and the two lived in the same house. However there is no evidence that the accused was in anyway involved in the disappearance of the deceased from the matrimonial home. No witness saw the deceased in the company of the deceased immediately prior to her disappearance. Both **PW1** and **PW2** told the court that the deceased used to sell clothes at the nearby market. Thus it was expected that she would be away on her business each day.

The circumstances under which the deceased went missing remain hazy and unclear.

Both **PW1** and **PW2** made mention of a blood stained foam mattress which was recovered in the accused’s house. The said mattress was never produced in court as an exhibit. **PW1** also stated that that the accused led police and showed them where he had hidden a blood stained panga believed to be the murder weapon. Again this panga was never produced in court as an exhibit. Failure to exhibit that items in court lead to doubt as to whether such items were actually recovered as alleged. Further **PW2** told the court that it was the investigating officer who recovered this blood stained panga. This investigating officer did not testify in court to confirm how and where he recovered this blood-stained panga and to confirm whether indeed it was the accused who led him to its recovery. The witnesses spoke of a biker and a bra which **PW2** identified as belonging to the deceased. These items were allegedly recovered in a nearby toilet. It is not known how those items got there. The officer who recovered them was never called to testify and the said clothes were never produced in court as exhibits.

If indeed all these blood stained items had been recovered then the logical thing would have been to have them taken to a Government Chemist for analysis to determine the source of the blood and to establish

whether these blood stains had any connection with the deceased. This was not done. The prosecution have omitted very crucial aspects of the investigation. Certainly no connection whatsoever is shown between the accused, any of the items or their alleged recovery.

**PW6** told the court that the accused recorded a statement before one Chief Inspector Orati in which he confessed to having murdered the deceased. The law on admissibility of any confession clearly set out in Section 25A of the Evidence Act. The said Chief Inspector Orati was not called to produce that alleged confession, thus this same or any reference to the same is not admissible as proof of the accused's involvement in the matter.

Without a doubt the fact that the accused was the husband of the deceased and the fact that the couple lived together certainly gives rise to a suspicion that he may have been in some way involved in the disappearance and murder of the deceased. However a mere suspicion is not sufficient. The prosecution must tender evidence to prove the involvement of the accused beyond reasonable doubt. **In SAWE Vs REPUBLIC [2003] KLR 364**, the Court of Appeal stated that

***“The suspicion may be strong but this is a game with clear and settled rules of engagement. The prosecution must prove the case against the accused beyond reasonable doubt. As this court made clear in the case of MARY WANJIKU GICHIRA Vs REPUBLIC (Criminal Appeal No. 17 of 1998 (unreported)) suspicious however strong cannot provide a basis for inferring guilt which must be proved by evidence”***

In this case the facts as I have stated earlier do certainly cast suspicion on the accused, but this suspicion is on its own not sufficient to prove the case. The prosecution has omitted several key and crucial aspects of this investigation. The prosecution failed to call the investigation officer to testify in this case. **PW6** told the court that he was not the investigating officer. Several gaps remain in the prosecution case. It is not the duty of the accused to fill in the gaps in the prosecution case.

Based on the above I find that the prosecution have failed to prove this offence of murder beyond reasonable doubt. I therefore enter a verdict of **‘Not Guilty’** and I acquit accused of this charge. The accused is to be set at liberty forthwith unless he is otherwise lawfully held.

**Dated and delivered in Nakuru this 7<sup>th</sup> day of April, 2017.**

Ms Njagwa for Accused

Mr. Chigiti for DPP

**Maureen A. Odera**

**Judge**