



**REPUBLIC OF KENYA**  
**HIGH COURT AT NAIROBI**  
**CRIMINAL CASE NO. 72 OF 2013**

**LESIT, J.**

**REPUBLIC .....PROSECUTOR**

**V E R S U S**

**JANE MUTHONI IRUNGU.....ACCUSED**

**JUDGMENT**

1. The accused **JANE MUTHONI IRUNGU** is charged with murder contrary to **section 203** as read with **section 204** of the **Penal Code**.

**“On the 15<sup>th</sup> day of June, 2013 at Sachangwan village in Molo District within Nakuru County murdered GLADYS NJERI.”**

2. The prosecution called a total of 10 witnesses, two of whom were later recalled by the court under **section 150** of the **Criminal Procedure Code**. These were PW5 and 10. PW5 was recalled to identify the knife recovered in his presence at the scene where deceased body was found. He was the first police officer to arrive at the scene. PW10 was one of two Investigating Officers of this case. He was recalled to identify the knife, P. Exhibit 3.

3. One other witness, CPL Munyiri, Court Witness number 1 was called by the court under **section 150** of the **Criminal Procedure Code** to produce the knife, P. Exhibit 3, and clothes P. Exhibit 4, 5 and 13 which he recovered at the scene where the deceased body was found. The accused on the other hand gave a sworn defence and did not call any witness.

4. The brief facts of the prosecution case were that the deceased was a friend of PW1 and wife of PW2. According to PW2, husband of the deceased, he knew the accused as a friend of his wife. It was the prosecution case that on 14<sup>th</sup> June 2013 the deceased borrowed a vehicle reg. No. KBT 270 B, Premio Toyota from PW1. The deceased informed PW1 that she would use it for a trip to Thika. The deceased collected it from PW1’s home the following morning, 15<sup>th</sup> June, 2013.

5. The deceased told her husband, PW2 that she was travelling to Thika with a friend without disclosing the name of her friend or nature of business. The deceased had not returned by 6p.m. When PW2 called her on phone, she did not pick the calls between 6pm and 9 p.m. PW2 called PW1 and requested her to try and call the deceased to see if she could respond.

6. PW1 called and the deceased picked the call. PW1 testified that she heard a male voice demanding money saying ‘*Njeri you will give us money*’. The deceased responded to say ‘*The money I had is the*

**one you have taken. I do not have any more money.'** Njeri was deceased middle name.

7. PW1 informed PW2 about the conversation she heard when she called the deceased. Both of them proceeded to Kayole Police Station where they reported between 11 p.m. and midnight same night. Police declined to circulate the car saying it was not safe with the deceased in the vehicle. They were referred to BuruBuru Police station where they went at 8 a.m. next morning.

8. While at BuruBuru Police Station on 16<sup>th</sup> June, 2013 in the morning a person called through phone No.07xxxxxxx asking for a ransom in order to release the deceased. The second time same caller informed PW2 that the vehicle was at Banana Police station. The phone number was eventually traced to Kamiti Prison. Apparently some ransom money was sent to that number but none of the witnesses disclosed who did it. I will get back to this later.

9. Same afternoon of 16<sup>th</sup> June, 2013 PW1 and 2 were escorted by BuruBuru Police to Banana Police Station where they found PW1's vehicle. The vehicle was photographed and the photographs produced as P.Exh.1.

10. On 18<sup>th</sup> June, 2013 PW1 received a call from Buru Buru Police station informing him that a body had been found in Molo area. PW1 sent his wife's brothers including PW3 to travel with PW8 to see the body. PW3 and the others confirmed it was the body of the deceased.

11. Two days before on 16<sup>th</sup> June, 2013 PW4 photographed the body of deceased on a murram road in Sangwan area. Earlier same morning of 16<sup>th</sup> June 2013, PW5 a police officer attached to Marsagen Police Post received a call from an employee of Komply Company Limited informing him of a dead body lying on a murram road. It was the body of the deceased.

12. The accused was arrested by PW10 who gave date of arrest as 15<sup>th</sup> June, 2013. That was obviously a mistake. The date of arrest is not in issue since the accused in her statement gave it as 21<sup>st</sup> June, 2013. That corresponds with PW8's evidence who said that he left for Molo to collect the deceased body on 21<sup>st</sup> June, 2013 and on return next day, he found the accused in police custody.

13. A statement under inquiry was recorded from her on the 23<sup>rd</sup> June 2013 by PW7 CIP Mwaura D/OCS BuruBuru Police station. The statement was admitted in evidence unopposed and was P.Exh.7.

14. In it the accused narrates how she travelled to Molo with the deceased who was driving PW1's vehicle. How they met 2 other men, one of them whose phone number the deceased caused her to call him using her, accused number so as to meet them. After supper with the two men the deceased left in the vehicle with the 2 men because the accused declined to accompany her to drop them at Sangwan. Three hours later the two men drove back without the deceased, that they were hostile to her, abusive and forced her to travel while seated on the floor of the rear seats. She states that they drove her back to Banana where she jumped out as the two men were busy trying to repair the vehicle after it stalled. She stated that she travelled to Muranga to her parents' home until 17<sup>th</sup> June, 2013 when she returned to her house in Kahawa West. She stated that she remained there until she was arrested on 21<sup>st</sup> June, 2013.

15. PW10 was the Investigating Officer in this case together with PW8. He testified that they were able to establish that accused and deceased left Nairobi for Molo together, through accused phone No.07xxxxxxx as the accused and the deceased phone numbers were pairing. It was PW10's testimony that he and his colleagues traced the accused in Kiambu Region through tracking of her Safaricom line and that they recovered from her the sim card with the line which paired with the deceased line, which was 07xxxxxxx. PW10 testified that the sim card was also registered under the accused name. It was produced as P. Exh. 12.

16. PW10 testified that at the time they arrested the accused she had removed the said sim card from her phone and had changed to a Yu line No. 07xxxxxxx, produced as P. Exh. 11 respectively and recovered

from accused Nokia phone P.EXh.10.

17. PW8 and 10 explained that another person had been arrested for the same offence for reason she was the owner of an M-pesa shop through which ransom money was paid. The said person, one Eunice Njeri Kariuki was however released when police failed to find any connection between her and the deceased disappearance. PW8 and 10 did not disclose how much money was paid as ransom, or who paid it.

18. PW10 explained that he and his investigation team were unable to find one Makumi and one Mukasi implicated with the case by the accused. The efforts made to trace them were not disclosed. The accused disclosed that she had used her phone to call one of the two men and so the number was available to the police. The failure to disclose efforts made to trace them may mean that none was made.

19. The accused gave a sworn defence. In that defence she repeated the story she gave to IP Mwaura who took her statement under inquiry. She stated that the idea to travel to Molo was from the deceased who picked her in PW1's vehicle. They met one Makumi who came with one Mukasi in Molo. These two men finally left with the deceased in deceased car, leaving her, accused, at a shopping centre. She said that the deceased told her to wait for her at the shopping Centre as she went to drop the two men at Sangwan area for the night.

20. The accused stated that three hours later the two men returned without the deceased. They had first called her to tell her to keep waiting as they were on their way. She said that when they returned, she was called a dog and threatened when she asked where the deceased was. The three of them drove in the night back to Nairobi. She said that upon reaching Banana area, the vehicle stalled and as the two men checked on it, she was able to come out of the vehicle and enter a trench where she remained until 5 a.m. When she took a matatu and travelled to her parents' home. She left the home the next day when she returned to her house and remained there until her arrest four days later. She said that she did not report the issue to anyone.

21. The accused person faces a charge of murder contrary to **section 203** of the **Penal Code**. That section provides as follows:

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

22. Malice aforethought is an important ingredient for the offence of murder. The prosecution has to prove that the accused person, by some unlawful act or omission caused injuries to the deceased as a result of which she died. The prosecution must prove that the act or omission was motivated by malice.

23. **Section 206** of the **Penal Code** sets out the circumstances which constitute malice aforethought in the following terms.

**“Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances:**

**1. 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,**

**2. 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;**

**3. An intent to commit a felony;**

**4. 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.”**

24. I have considered the evidence together with the submissions from Ms. Onunga, learned Prosecution Counsel and Mrs. Omungala counsel for the defence. The issues which emerge in this case are:

- a) **Whether the circumstantial evidence against the accused can sustain a conviction.**
- b) **Whether there was inconsistency in the prosecution evidence and whether that inconsistency was material.**
- c) **Whether the prosecution has proved motive.**
- d) **Whether the accused defence creates doubt that she had any role to play in the deceased death.**

25. There was no eye witness of the attack on the deceased. The post mortem indicates that the deceased was murdered by slitting her throat, trachea and blood vessels around the neck. The prosecution is relying on circumstantial evidence in support of their case. The law regarding circumstantial evidence is now well settled.

26. In the Court of Appeal case of **CHARLES MATHENGE MWANGI & ANOTHER –V- REP CA NO. 72 OF 1997** (unreported), where OMOLO, TUNOI JJA and RINGERA Ag. JA held:

**“The answer must be that in a case depending on circumstantial evidence, each link in the chain must be closely and separately examined to determine its strength before the whole chain can be put together and a conclusion drawn that the chain of evidence as proved is incapable of explanation on any other reasonable hypothesis except the hypothesis that the accused is guilty of the charge – see for example REX vs. KIPKERING ARAP KOSKE & ANOTHER [1949] 16 EACA 135.**

**With profound respect to the learned Judge, it was his duty to himself and to the assessors to specify which circumstances he was relying on and what inference(s) he was drawing from those circumstances. We have ourselves set out what we think were the circumstances the prosecution was relying on and we have come to the conclusion that those circumstances are not necessarily incompatible with the innocence of the appellant. We do not know if the Judge would have come to the same conclusions had he set out each individual circumstance, and analysed it as we have done. Nor was it fair to the assessors to be given directions on the general principles applicable to circumstantial evidence without explaining to them the individual circumstance and asking them what inference they thought could be drawn from the circumstance.**

**We have said enough, we think, to show that we are not satisfied the conviction recorded against the appellant was safe. We are more inclined to agree with the dissenting assessor than with the learned trial Judge and the majority of the assessors. We accordingly allow the appeal, quash each of the four convictions recorded against the appellant, set aside the sentences of death imposed on each count and order that the appellant be released from prison forthwith unless he is held for some other lawful cause.**

**Those shall be our orders in the appeal.”**

27. In **SAWE –V- REP[2003] KLR 354** , the Court of Appeal set out principles applicable when considering circumstantial evidence and held as follows:

**“1. In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypotheses than that of his guilt.**

**2. Circumstantial evidence can be a basis of a conviction only if there is no other existing**

**circumstances weakening the chain of circumstances relied on.**

**3. The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution. This burden always remains with the prosecution and never shifts to the accused.**

4. ...

5. ...

6. ...

**7. Suspicion, however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt.”**

28. The prosecution is relying on the statement under inquiry taken from the accused by PW7, on 23<sup>rd</sup> June, 2013. The only other evidence the prosecution adduced was the fact the deceased took a vehicle from PW1, a friend and neighbour and travelled in it, only for the vehicle to be recovered at Banana in Kiambu, one day later. The deceased body was found one day after she travelled, in Molo area which is several Kilometers from Thika where the deceased informed her husband, PW2 and PW1 that she was intending to go.

29. The other evidence is the fact that on the night of the same day the deceased had travelled, PW1 and 2 each called the deceased on phone and when she answered, both heard a male voice demanding money from the deceased, and the deceased answering that apart from the money they had already taken, she had no more money.

30. The other piece of evidence relied upon was the fact the accused did not inform the police or the husband of the deceased when she returned alone to Nairobi. The other fact was that she had a phone line 07xxxxxx P. Exh. 12 which she was using while in Molo but upon her return to Nairobi, she changed her line to a Yu line number 07xxxxxxx produced in evidence as P. Exh. 11.

31. Apart from accused statement under inquiry, PW8 and 10, the Investigating Officers in this case only managed little. For one, there was no eye witness of the murder. Neither was there any evidence to show who was with the deceased at any part of the day in question. The only evidence any witness had of deceased movement was PW1 and 2 who knew she had gone to Thika.

32. Regarding the confession, the accused admits that she went to Molo with the deceased and that they were together until the point the deceased left with Makumi and Mukasi. Thereafter she claims to have seen Makumi and Mukasi return without the deceased but was not able to establish where she had been left because the two men were aggressive and abusive towards her. She was carried at the floor of the vehicle until Banana where she says the vehicle stalled.

33. Under **SS.111 (1)** and **119** of the **Evidence Act** a statutory rebuttable presumption exists. In this case it exists against the accused person. The two sections stipulate as follows.

**“111. (1) When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him:**

**Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution, whether in cross-examination or otherwise, that such circumstances or facts exist:**

**Provided further that the person accused shall be entitled to be acquitted of the offence with**

**which he is charged if the court is satisfied that the evidence given by either the prosecution or the defence creates a reasonable doubt as to the guilt of the accused person in respect of that offence.”**

**“119. The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.”**

34. The presumption operates against the person in whose interest it is to give an explanation of facts which are within their knowledge. In this case the accused has admitted that she travelled to Molo with the deceased. She therefore has a rebuttable burden to explain either how the deceased died or how they parted ways with the deceased. The accused did not give any explanation of how the deceased died. It is her defence that she parted with the deceased when she was alive and well, and that she travelled in company of two people whose name she gave to police and also the court as Makumi and Mukasi.

35. The prosecution has the burden to adduce evidence to show two things. One that the accused did not part with the deceased but that she was with her all the time. Two that the accused was a party to the deceased murder. The burden has not been discharged because the prosecution has not adduced any evidence which places the accused at the scene of murder. Accused confession admits to having been with the deceased up to Molo, but not in Sangwan where her body was found. There is therefore a missing link between the accused and the scene where the deceased met her death. That also means that the prosecution has been unable to prove that at the time the accused arrived in Banana and proceeded to her parents home and later to her house, that she knew the deceased had died.

36. That also means that the accused conduct not to make any report of deceased death is capable of an innocent explanation, which is that the accused did not know that the deceased was dead. I agree it is suspicious that she did not at least inform PW2 who knew her as his wife's friend of what had transpired when they travelled to Molo. However, that is only suspicious. **Sawe Vs Rep**, supra is clear that suspicion however strong cannot form the basis of a conviction.

37. I have considered that the accused gave information to the police which she allowed the prosecution to admit without objection. Her defence under oath is much to the same strength. I find that the accused gave a lot of detail of her movement with the deceased. She disclosed that she heard the deceased say that she had 700, 000/- as they discussed business with Makumi. In my view the accused was candid, cooperative and very helpful to the police throughout the investigations.

38. On the other hand I find that the help the accused offered to PW8 and especially 10 who was the more senior officer was not utilized. There is evidence from PW10 that the accused gave them the name of the persons they met in Molo. It is in her statement under inquiry and her defence in court that she was asked by deceased to call Makumi on her phone. She also said that she was called by Makumi after he left with the deceased. All this information could have been found in the phone data of the accused. PW10 talks of using phone data to track down the accused. However, it appears that PW10 did not bother to counter check the allegation by the accused by checking for Makumi's number in her phone in order to try and track him down very much in the same way he tracked down the accused. That to me was poor conduct of investigations.

39. The poor investigations did not end there. There was the person who demanded ransom from PW2 in order to see his wife back. Apart from stating casually that the number was an airtell line traced in Kamiti Prison, PW10 did not bring any evidence to demonstrate the same.

40. There was the further weakening of the case when the owner of an M-pesa Agency where the ransom money was collected was released without being charged, but even worse PW10 stated in evidence that the said lady, one Eunice had told her employee not to release the money. That evidence was muzzled as there was no disclosure of the amount the ransom was, the phone number through which it was withdrawn and the connection between the persons who collected the ransom to the deceased death. It will be correct to say that that evidence was withheld, which evidence was of such importance that it

could have helped resolve this case.

41. The other fact is that the Safaricom Data through which PW10 said he tracked down the accused was not produced in evidence. PW10 did not say how he learnt of the accused number or how he came to track down the accused using the said number. All these facts create the impression that PW10 was not transparent in the manner in which he conducted his investigations. Not to mention that PW10 had withheld exhibits and they were not availed until the court summoned him and ordered him to avail them.

42. As to whether the motive was established. Neither PW1 nor her husband PW2 had an idea of where the deceased travelled. It is clear she lied to PW1 and her husband PW2 that she was going to Thika. PW2 was sick and bedridden at the time. He did not know the nature of business the deceased went for, the person she went with or whether she had any significant amount of money with her. Most importantly the prosecution has been unable to adduce any evidence that would establish a motive for deceased murder whether against the accused or any other person. However motive need not be proved. This is evident under **section 9(3)** of the **Penal Code** which stipulates thus:

**(3) Unless otherwise expressly declared, the motive by which a person is induced to do or omit to do an act, or to form an intention, is immaterial so far as regards criminal responsibility.**

43. That provision was the subject of interpretation in the case of **Chogo Vs Republic (1985) KLR1**, where the Court of Appeal held as follows:-

**“Under section 9(3) of the Penal Code (cap 63) , the prosecution is not required to prove motive unless the provision creating the offence so states, but evidence of motive is admissible provided it is relevant to the facts in issue. Evidence of motive and opportunity may not of itself be corroboration but it may, when taken with other circumstances, constitute such circumstantial evidence as to furnish some corroboration sufficient to establish the required degree of culpability. The evidence of the ill-feeling between the deceased and the 1<sup>st</sup> appellant would have been a corroborative factor if the other evidence had been satisfactory which it was not.”**

44. Even though evidence of motive is not mandatory to be proved, it could have been of great significance in this case if it was available seeing that there was little else to rely on.

45. I have set out what I think were the circumstances the prosecution was relying on in this case and I have come to the conclusion that those circumstances are not necessarily incompatible with the innocence of the accused. I find that they were capable of an innocent explanation. Even though accused conduct on the 15<sup>th</sup> to 21<sup>st</sup> of June, 2013 was suspicious, I find that the suspicions alluded to did not point irresistibly to the accused as the perpetrator of the deceased murder. Specifically the lack of evidence placing the accused at the scene of murder, and the lack of evidence to prove that the accused knew that the deceased was dead by the time she went to her parents’ home and later to her home. All these facts create doubt whether the accused conduct was that of a guilty mind. That weakens the evidence of suspicion against the accused even further.

**46. In the result I find that the prosecution has failed to prove the charge against the accused as charged. I give her that benefit of doubt and acquit her accordingly.**

**DATED AT NAIROBI THIS 19<sup>TH</sup> DAY OF JULY, 2017.**

**LESIIT, J**

**JUDGE**