



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

**CRIMINAL CASE NO. 103 OF 2012**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**NANCY WAITHERA MACHARIA.....ACCUSED**

**JUDGEMENT**

**Background**

Nancy Waithera Macharia, referred to in this judgement as the accused, is charged with murder contrary to section 203 read with section 204 of the Penal Code (Cap. 63 Laws of Kenya). The particulars of this offence state that on 8<sup>th</sup> December 2012 at Mathare Kosovo slums within Nairobi County in the Republic of Kenya she murdered Peter Njoroge Mwangi (the deceased).

Hearing of this case commenced on 7<sup>th</sup> August 2013 before Honourable Lady Justice Florence Muchemi. She took evidence of five prosecution witnesses. Upon her transfer to another station I took over the proceedings and received evidence from four prosecution witnesses. The accused opted to remain silent after this court placed her on her defence.

**Facts**

The accused and the deceased were a couple. They lived in Mathare Kosovo slums in Nairobi. Their house was constructed with iron sheets and was partitioned so that one part in the front of the house was used as a shop. One Julius Kamau Muturi, PW3, was employed by the deceased to manage the shop for him. The couple had a neighbour, one Rose Wanjiku Njogu, PW1, whose house shared a common wall. Rose Wanjiku told the court that there was a hole in the wall made by nail mark and through this hole she was able to see some part inside the deceased's house. Rose said she could also hear what went on in that house.

It emerged from the evidence that the accused's and the deceased's was not a peaceful marriage. A week prior to 8<sup>th</sup> December 2012 the couple is said to have quarreled. While the deceased slept the accused is said to have taken household items including shop goods and left. They later made up and the accused returned home. This is confirmed by the evidence of Rose Wanjiku and Jamleck Macharia Mwangi, PW2, brother to the deceased.

On the fateful day, the couple fought again and shortly thereafter the accused attacked her husband as he lay on the bed watching television. She used a kitchen knife to inflict stabs wounds on him which led to his death.

## **Charge of murder**

Murder is defined in our law 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.”**

This definition carries the ingredients of this offence which must be proved beyond reasonable doubt if the court trying an accused person is to convict him or her for the offence of murder. The onus of proving this crime lies with the prosecution who must prove that death of the deceased has occurred; that the death was unlawfully caused by the accused before the court and that the accused possessed the intention to kill the deceased. All the evidence in a murder trial must be directed towards proving the above.

Malice aforethought, the intention to commit a crime, is defined under section 206 of the Penal Code. It is established if there is evidence to prove any of the following:

**(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) 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;**

**(c) an intent to commit a felony;**

**(d) 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.**

## **Analysis and determination**

From what can be gathered from the evidence of Rose Wanjiku, Jamleck Macharia and Julius Kamau, the accused attacked the deceased with a kitchen knife around 11.00pm. R W heard the couple quarreling after which the deceased left the house. He returned later. The accused sat on him as he lay on the bed watching television. She stabbed him with a knife on the neck, abdomen and chest. Rose Wanjiku saw the stabbing when she peeped through the hole in the wall partitioning her house from that of the deceased.

Julius Kamau was attracted by the deceased calling his name and asking him for help. He went into the deceased's bedroom and found the accused holding the knife and sitting on the deceased while the latter lay on the bed. The deceased was bleeding from a stab wound on the neck. Julius Kamau called neighbours for help. Julius also telephoned Jamleck Macharia who lived a walking distance from the deceased. Jamleck went to the scene and found the accused sitting on the deceased on the bed. Jamleck saw a stab wound on the deceased's left neck, left ribs and left chest.

Police Constable Gilbert Githinji, PW6, was in the neighbourhood of Kosovo on 8<sup>th</sup> December 2012 around 11.00pm. He had gone to a butchery nearby in his personal car registration number KAX 270B to buy meat. While returning to his car, the accused who was not known to him approached him for help to take a sick person to hospital. The accused had blood on her hands and told the officer that she had been injured as she fought with the injured person. Since the vehicle could not reach the scene due to the condition of the road PC Githinji told the accused to bring the injured person to where the car was. After a while PC Githinji heard screaming from the woman and went to find out what the problem was. He found a hostile crowd beating the accused. He was informed of the murder. He stopped the crowd from beating the accused and entered the house. He found the body of the deceased on the bed and bloodstains in the house. He took the accused to Muthaiga Police Station and reported the matter. Police later collected the body from the scene.

The issue I want to address is whether the prosecution has proved death of the deceased. Doctor John Mungai, PW8, examined the body of the deceased on 11<sup>th</sup> December 2012. He found stab wounds on the chest, upper shoulder region and rib cage with severed main blood vessel to the heart. The doctor formed an opinion that the cause of death was severe blood loss due to the injuries the deceased had suffered. I have no doubt in my mind that the deceased died due to the injuries he sustained. I find this ingredient proved beyond reasonable doubt. Also proved beyond reasonable doubt is the fact that the death of the deceased was unlawful. This can be concluded from the evidence on record.

The second issue is the identity of the person who inflicted the fatal wounds on the deceased. Rose Wanjiku told the court that through a hole in the wall she saw her neighbour the accused attack her late husband. Rose said she saw the accused sitting on the deceased who was lying on the bed. The hole she peeped through was said to have been made by a nail. She said she saw the accused stab the deceased on the left neck, chest and abdomen. Rose told the court that the rooms were well lit with electricity and this enabled her to see what took place inside the deceased's house.

Julius Kamau told the court that after hearing the deceased calling him for help he went to the bedroom and found the accused sitting on the deceased on the bed and that the deceased was bleeding from stab wounds. Jamleck Macharia arrived at the scene after Julius Kamau called him. He found the deceased, his brother, lying on the bed with the accused sitting on him. The deceased had stab wounds. The evidence of these three witnesses points to the accused as the person who had stabbed the deceased.

The defence counsel Mr. Clarence Jumba, advocate, raised issue with the hole in the wall. He was of the view that Rose could not have clearly seen the accused stabbing the deceased using a hole made by nails. He held the view that such a hole did not exist since PC Githinji had told the court that the walls of deceased's house had been covered with cardboards. It is true that PC Githinji said the walls were covered with cardboard. The same was stated by PC Paul Ngei the Investigating Officer. However, I noted that PC Ngei clarified that the part of the wall neighbouring Rose had no cardboard covering it.

Even if this court were to take it that the walls were covered and Rose could not have seen inside deceased's house, there is still the evidence of Julius Kamau and Jamleck Macharia who went to the scene and found the accused sitting on the deceased who was injured and bleeding. The injuries described by Rose Wanjiku have been confirmed by the evidence of Julius Kamau and Jamleck Macharia. Dr. Mungai also confirmed the injuries on the areas Rose said she witnessed the accused stabbing the deceased. There is no evidence of another person in that house.

With care I have examined this evidence and I am convinced that the accused is the person who inflicted the fatal wounds that led to the death of the deceased. I find sufficient evidence to remove any reasonable doubt in my mind that the accused attacked and fatally wounded her husband by stabbing. I wish to distinguish **Criminal Appeal No. 11 of 2006 Jackson Muchiri Gachunga & Another v. Republic [200] eKLR** cited by the defence on the issue of identification of the accused with this case. In this case there is evidence to show that the accused was found by Julius Kamau and Jamleck Macharia sitting on the deceased and the court is not solely relying on the evidence of Rose Wanjiku on that issue.

Lastly, there is the issue of intent to commit murder. For the accused to be guilty of murder the prosecution must prove malice aforethought as defined above. Did the accused possess malice aforethought? There is evidence that the deceased and the accused did not enjoy a peaceful marriage. They fought about one week before this date. The accused took deceased's shop goods and left. They reconciled and she returned home. On the material day, they quarreled and fought according to Rose Wanjiku. Julius Kamau too told the court that he heard the two talking but could not hear what was being said. Both witnesses said the deceased left but returned later that evening. Rose said she peeped through the hole and saw the deceased lying on the bed watching television. She then saw the accused go to the bed armed with a knife. She saw the accused sit on her husband as he lay on the bed and stabbed him. Julius heard the deceased calling him to help.

I have carefully analysis of all the evidence. I noted what Rose told the court she saw. Jamleck Macharia found the accused still sitting on the deceased on the bed. Jamleck saw three stab wounds, on the left

neck, left ribs and left chest. Julius Kamau answered to distress calls by the deceased for help. On entering the room he found the deceased lying on the bed with the accused sitting on him while holding a knife and the deceased bleeding from the neck.

In addition to the evidence of the three witnesses, I have examined the evidence of Dr. Mungai. He confirmed the three stab wounds found on the body of the deceased. On cross examination, Dr. Mungai told the court that he did not find any defence wounds on the body of the deceased to indicate that he defended himself from the stabbing. He also told the court that it was possible that the assailant inflicted the wounds on the deceased while the deceased was lying down or from the back. I find this evidence in agreement and I am persuaded that the deceased was taken unawares. The evidence points to the fact that the deceased was attacked while he lay on the bed and had no chance to defend himself. In other words he was helpless when he was attacked.

I have noted that the defence did not plead provocation or any other defence available to them. The accused exercised her right to silence. It is her entitlement and this court will not fault her on that.

After carefully considering this evidence I agonized over whether the accused possessed malice aforethought as defined under section 206 of the Penal Code. Can a person of sound mind who catches a victim unawares and sits on him and inflicts three stab wounds from the back be said to possess malice aforethought? It is expected that anyone acting as the accused did would know that his/her actions would cause the death or grievous harm to the victim. Or that the act will probably cause the death of or grievous harm to some person. I find that I am persuaded that the accused, by going to the bed where the deceased lay and stabbing him from the back must have known that her actions would either cause the death of or grievous harm to the deceased. In my considered view the accused possessed malice aforethought as defined under section 206 of the Penal Code. I find this ingredient proved beyond reasonable doubt.

I have taken into account the evidence that she went to seek for help from PC Githinji to take the deceased to hospital. This act points to a remorseful person who has come to her senses and realized what she had done but this in my view does not change the fact that she had formed an intention to attack and seriously injure the deceased. While I note that the couple did not enjoy a peaceful marriage and that they had quarreled on the day in question, evidence shows that the deceased had left after the quarrel and had returned to the house after lapse of some time. Even assuming that the accused was angry with the deceased after the quarrel, the time between when the deceased left and the time he returned afforded both of them time to cool down. There is no quarrel reported after the deceased returned to the house. Evidence shows that he went to lie down on the bed to watch television. He was fatally attacked while lying defenseless on the bed.

### **Conclusion**

Having found that the accused unlawfully caused the death of the deceased and that there is evidence to prove beyond reasonable doubt that she had formed the intention to kill him or to cause grievous harm to him, it is my considered view that the charge of murder has been proved beyond reasonable doubt. It is my finding that the accused is guilty of murder as charged. Consequently, she is hereby convicted of murder as charged. I make orders accordingly.

**Dated, signed and delivered this 9<sup>th</sup> day of July 2015.**

**S.N. MUTUKU**

**JUDGE**

**In presence of:**

Miss Macharia for the State

Mr. Clarence Jumba for the accused

Nancy Waithera Macharia the accused

Daniel Ngumbi the Court Clerk