



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**CRIMINAL CASE NO. 7 OF 2013**

REPUBLIC..... PROSECUTOR

VERSUS

ABDUBA GUYO WADA .....ACCUSED

**JUDGMENT**

**ABDUBA GUYO WADA** hereinafter referred to as the Accused faces a charge of murder contrary to section 203 as read with section 204 of the Penal Code.

The particulars being that:-

***“On the 29th day of January, 2013 at Kisauni Dog Section Police Quarters within Coast Province murdered MILGA ABDULAHI”.***

The prosecution in this case called nine (9) Witnesses in support of their case.

The defence called one.

**Brief facts**

The Deceased (a 23 year old lady) was at the time of her death a police Constable attached at Makupa police station and was staying at Kisauni Dog Section police lines (Quarters).

The Accused (her suitor) was working previously as a chef in a Hotel going by the name and style of Holiday Inn Hotel – Juba Southern Sudan, but had returned back to the country for medication.

The two were desirous of getting married and their intentions had been made known and revealed to the Deceased parents and in particular her mother (PW 1).

Like in most relationships, theirs did not lack in misunderstandings largely hinged on financial problems and infidelity.

In his sworn testimony the Accused told the Court that on the 29th day of January, 2013 he was in the Deceased room at Kisauni dog section. She arrived at around 7:30 p.m. and informed him that she wanted to discuss about their wedding preparations. She complained of being economically challenged as she had taken a loan and her payslip showed Ksh. 2,000/= only, which was insufficient to make ends meet. She threatened to get funds from another boyfriend.

They had a quarrel and the Deceased picked a knife and cut the Accused. Thereafter the Accused proceeded to Nyali police station to report the matter which was booked in OB 68 of the same day. He was placed in a police vehicle for purposes of going to Kisauni Dog Section but on the way while near Kengeleni lights, the OCS said that they had talked with police officers at Dog Section and there was no need to proceed to the scene.

He was taken to his sisters place where he spent the night and the following day he decided to go back to Southern Sudan. His phone battery went low. Upon arrival at Nairobi, he got information that he was being sought for by police. He decided to go to Isiolo where he surrendered to police. He was taken to Mombasa where it was alleged that he had murdered his girlfriend.

In his statement under inquiry which was produced as prosecution exhibit No. 4, the Accused states to have called by phone the mother of the Deceased after he had quarrelled with her daughter. He further stated that the Deceased grabbed him by the neck and he pushed her upon which she fell on the seat. That she woke up from the seat and threatened to set the house on fire by switching on cooking gas. That he got a small burn on the right hand. That the Deceased picked up a knife and cut him twice on the hand. He pushed her again and she fell on the seat. She threatened to commit suicide. He hurriedly, left the house and went to Nyali police station where he reported the incident which was booked as OB 68 of 29th January, 2013. That an attempt was made by police to take him back to the scene but after consultation with Kisauni Dog Section it was confirmed that all was well and it was agreed that he be dropped at his sisters place in Nyali. The following morning he packed his belongings and proceeded to Nairobi where he received information that his girlfriend was found dead in her house and he was a suspect. He got scared and he decided to go to his rural home at Isiolo. He further stated that before leaving Mombasa he had received a call from one Somali police officer stationed at Nyali police station, cautioning him about the report he made at the station. He denied having killed his girlfriend.

Dr. Ngali Mbuko PW 7 is a consultant pathologist. He performed an autopsy on the body of the Deceased. Blood was oozing from the nostrils and the mouth. There were nail scratch marks on either side of the neck. On the Respiratory system, there was frothy blood in the airways.

She was in her menses – sanitary pad found in Situ.

He formed the opinion that cause of death was consistent with asphyxia due to manual strangulation.

PW 9 Mr. Shadrack Juma superintendent of police was the investigating officer in this case. A report was made to him of the murder of police woman based at Makupa police station. They proceeded to the scene of the crime which was at Kisauni Dog Section at the living quarters of the Deceased. She was staying together with the Accused who left the house on 29th January, 2013 and Mombasa the following morning.

Police used safaricom to trace him through his phone. He switched off his phone at Mwembe Tayari the morning of 30th January, 2013. He arrived late in Nairobi the same day. He later surrendered himself at Isiolo police station and was arrested by inspector Ndungu and later escorted back to Kisauni police station where he recorded a statement under inquiry.

In this case no Witness saw the Accused inflict the fatal blows on the Deceased.

What is before the Court is circumstantial evidence.

In the Court of Appeal case of James Mwangi -Vs- Republic KLR 1983. It was held,

***“In a case depending on circumstantial evidence, in order to justify the inference of guilt, the incriminating facts must be in compatible with the innocence of the Accused, the guilt of any other person and incapable of explanation upon any other reasonable hypothesis than that of guilt.*”**

2. ***In order to draw the inference of the accused's guilt from circumstantial evidence, there must be no other co-existing circumstances which would weaken or destroy the inference .....***

### **State of mind of the Accused**

The Accused does not deny that on the 29th January, 2013 he did quarrel with the Deceased. He does not deny the fact that he reported their differences that day to the Deceased mother by way of a phone call.

The Deceased mother (PW 1) did testify to have been called by the Accused who was saying that if he was not allowed to marry the Deceased he would kill himself.

Her daughter (the Deceased) had told her that she was in the company of her lover and he was threatening to kill her.

### **The case for the defence:**

In his defence, the Accused while admitting that he had quarrelled with the Deceased maintains that she is the one who assaulted him by way of cutting and wounding him by the use of a knife and he reported this fact to the police who instead of going to arrest her decided to drop him at his sisters house at Nyali and he decided to go to Nairobi the following day.

In his statement under inquiry exhibit No.4, he contends that its the Deceased who grabbed him by the neck and he pushed her and she fell on the seat. She picked a knife and cut him twice on the hand. He pushed her and she fell on the seat and he dashed out to report the matter to police.

### **Evaluation and analysis**

The Accused did testify to have quarreled with the Deceased at around 8:30 p.m. of the fateful night.

The post mortem report form (exhibit No. 1) indicates that the body was found at the scene on 30th January, 2013 at 10:30 a.m. Its apparent that the Doctor was not requested to find and ascertain the time of death.

The OB extract which was produced as exhibit No. 5 does not indicate the time the Accused went to report that he had been assaulted. It only indicates the time of the alleged assault.

The events between the report at the Nyali police station and the recovery of the body of the Deceased the following morning are a bit blurred and suspicious.

Suspicious in the fact that a report of Assault was made at the police station. The advice that could have been readily given to the Accused would be that a P3 form would be issued to him and he should go for medical attention. Instead, he was put in a police van and they headed to dog section Kisauni ostensibly to effect an arrest adduced. According to the evidence adduced by the Accused in his defence, the officers communicated with those at Kisauni dog section who confirmed that all was well and they returned to Nyali and he was dropped at his sisters place.

What was that confirmation for if the intention was to go and arrest the Deceased?

Secondly, who is this officer who had embarked on the journey to Kisauni and decided to return on the way before accomplishing his mission and who is it that confirmed that all was well.

If the intention by the police officers was to go and gather more evidence on the assault case and arrest the Deceased, then that quest could not have been solved by communicating with other officers but by direct communication with the Deceased herself.

It is instructive to note that the Accused had been staying with the Deceased, after reporting that he had been assaulted, the next obvious thing would have been to return to his girlfriend but he instead proceeded to his relatives place at Nyali to spend the rest of the night and early in the morning took the next bus to Nairobi and to his rural home in Isiolo.

If he was the one who was assaulted as per his allegations the reasonable thing to do was to pursue his case with the police or to go back to the Deceased and reconcile with her. Failure to return to his girlfriends house after the alleged assault and his conscious efforts to distance himself from the scene as far as possible cannot be interpreted in any other way or manner but the act of a man consumed with guilt.

The Accused escape from the scene and running to hide in Isiolo is an incriminating fact which is incompatible with his innocence.

He quarreled that night with the Deceased and a scuffle ensued and the following morning she was found dead as a result of strangulation. The theory advanced that any of her former boyfriends could have murdered her does not hold much water. There was nothing to show that they bore a grudge against her and that they had been seen inside the police quarters. The evidence against the Accused irresistibly points to his guilt.

The Deceased had informed her mother that fateful night that her lover was threatening to kill her. That lover was the Accused. He had the opportunity to commit the act as the two were staying in the same house.

Section 206 of the Penal Code defines malice aforethought thus,

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

***(a) An intention to cause the death of or to 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 harm is caused or not, or by a wish that it may not be caused.***

***(c) Intent to commit a felony***

***(d) .....”.***

In the present case the Accused had the intention to cause death of the Deceased. He told her so and she relayed this information to her mother.

The act of strangulation in itself points to an intention to cause death or grievous harm to a person.

I am satisfied that the prosecution has proved this case beyond reasonable doubt. I find the Accused guilty of the offence of murder contrary to section 203 as read with section 204 of the Penal Code and Convict him accordingly under section 322 of the Criminal Procedure Code.

Judgment delivered dated and signed this **1st** day of **October, 2015**.

.....

**M. MU YA**

**JUDGE**

**1ST OCTOBER, 2015**

**In the presence of:-**

Learned Counsel for the Accused Mr. Magolo

Mr. Masila for prosecution

Court clerk Musundi

**M. MUYA – JUDGE**

**Court:**

Bond canceled. Mitigation tomorrow and further orders.

.....

**M. MUYA**

**JUDGE**

**1ST OCTOBER, 2015**

**2/10/2015**

Before Hon. Justice M. Muya

Court Assistant Musundi

Masila for the State

Magolo for the Accused

**Mitigation:**

On behalf of the Accused person. We pray for Courts leniency. The Accused is 34 years old. He is the bread winner of the entire family. He has six sibling. He has a young wife with two children. He is the sole bread winner. The Accused is remorseful.

He regrets the incidence. He has reflected and relieved the incident. He is a very traumatized person. The deceased died in his hands. We pray that the Court bears his consideration. The Accused is reformed and rehabilitated while on bond. He faithfully attended Court. He hails from a border community. He could have escaped. Any Sentence is intended to help in rehabilitation faced with this situation. What does the Court to do. The legislature has given the Court wide discretion.

Its now trite law that there nothing like mandatory sentence. The discretion of the Court cannot be filtered. We are therefore asking the Court to use its discretion. The future of the siblings and two children should not be destroyed.

**Criminal Appeal No. 239 of 206 Harrison Mutisya Munene –Vs- Republic.** The appellants had been sentenced to death an appeal was filed. The Court confirmed that the Conviction was wrong but it referred it to High Court that the appellant be given an opportunity to mitigate.

**Court:**

Mention on 5th October, 2015 for further mitigation and Sentencing.

.....

**M. MUYA**

**JUDGE**

**5TH OCTOBER, 2015**

**5th October, 2015**

Before Muya – Judge

Masila for the prosecution

Magolo for the defence

Court Assistant Musundi

**Court: Mention** at 10:00 a.m.

**Mr. Magolo:**

I have gone thorough the case of Joseph Ngotho Mutiso and that of Joseph Njuguna at page 7. Death Sentence is lawful but the Court held that death Sentence is discretionary. A person Convicted of any offence can be placed on probation.

The appellant ought to be treated with leniency.

We pray that the Court does consider that while Sentencing the Accused. This is the third day. We have been in this Court doing mitigation.

Thats all.

.....

**M. MUYA**

**JUDGE**

**5TH OCTOBER, 2015**

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CRIMINAL CASE NO. 7 OF 2013**

REPUBLIC..... PROSECUTOR

VERSUS

**SENTENCING NOTES**

This Court has taken into consideration the mitigation by the Accused through his able Counsel Mr. Magolo. It is noted that he is a young man aged thirty four (34) years. He has six siblings and a young wife with two children. He is said to be remorseful and regrets what transpired on that fateful day. That he has been reformed and rehabilitated while out on bond. Further that he has been attending Court without fail.

Counsel has maintained that it is now trite law that death Sentence is not mandatory and the Court has discretion which is unfettered. Counsel has relied in Court of Appeal decision CRA No. 239 of 2006. **Harrison Mutisya Mwema & Another – Vs – Republic.** In that appeal the Judges noted,

As for Subsentence the Superior Court simply imposed the death Sentence as by law mandated “without receiving any mitigation from the appellants or any antecedents from the State. This Court has stated before that such mode of Sentencing is wrong in law as it deprives, the convicted person of an opportunity to have his Sentence reconsidered for commutation or pardon under section 332 of the Criminal Procedure Code. Further more, as recently as July, 2010, this Court in the case of **Godfrey Ngotho Mutiso –Vs- Republic Criminal Appeal No. 17 of 2008** emphatically stated that there was nothing mandatory about the death Sentence.

As regards section 204 of the Penal Code. That Court stated section 204 of the Penal Code which provides for a mandatory death Sentence is antithetical to the Constitutional provisions on protection against inhuman or degrading punishment or treatment and fair trial. We note that while the Constitution itself recognizes the death penalty as being lawful, it does not say anywhere that when a Conviction for murder is recorded, only the death Sentence shall be imposed. We declare that section 204 shall, to the extent that it provides that the death penalty is the only Sentence in respect of the crime of murder is inconsistent with the letter and spirit of the Constitution, which as we have said, makes no such mandatory provision.

The issue of mandatory death Sentence was revisited in the same Court of Appeal but this time around consisting of a five Judge bench in the case of **Joseph Njuguna Mwaura & Others -Vs- Republic Criminal Appeal No. 5 of 2008.**

The Judges observed,

***“We hold that the decision in Godfrey - Vs- Republic to be per incuriam in so far as it purports to grant discretion in Sentencing with regard to capital offences. Our reading of the law shows that the offences of murder contrary to Section 203 as read with section 204 of the Penal Code, treason contrary to section 40 of the Penal Code, robbery with violence contrary to section 296(2) of the Penal Code ..... carry the mandatory Sentence of death”.***

Should Kenyans decide that it is time to remove the death Sentence from our statute books then they shall do so through their representativeness in parliament. In the meantime, the Sentence of death shall continue to be imposed in case of Conviction where the law provides.

This Court is bound by the latter decision unless a contrary finding is made by the Supreme Court.

I am not aware so far of such a decision. The Accused is to suffer death as per law provided.

.....

**M. MUYA**

**JUDGE**

**5TH OCTOBER, 2015.**