



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
CRIMINAL CASE NO. 73 OF 2010

REPUBLIC.....PROSECUTOR

VERSUS

JAMES GACHEGWA MWAURA.....ACCUSED

JUDGMENT

James Gachegwa Mwaura faces a charge of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**. The allegation against him is that on 29/6/2010 at Kapsile Farm in Elburgon, in Molo District, he murdered Nancy Wanjiku Maweu. The accused denied the offence and the prosecution called a total of 9 witnesses in support of their case while the accused testified on oath in his defence but called no other witness.

PW1, Margaret Gathoni Wanjiku is the daughter of the deceased. She told the court that the accused person was a friend of the deceased. She had known them to have been friends for 6 months. On 29/6/2010, about 6.00 p.m. PW1 went to the deceased's house which was about 20 minutes walk from her house. She found her mother waiting for Nyambura, PW5, in order to go to St. Stephens Centre. She left them. The deceased and PW5 passed by her house about 6.30 p.m. and picked one Mama Lilian on their way to the club. She later went to the centre and found the deceased at the club with Nyambura (PW5), and Samuel Kamau, taking alcohol. She left them at 7.00 p.m. leaving the deceased drunk but she could walk and talk. About 1.00 a.m. when she was asleep, she heard a knock and there came 2 police officers, the accused, Jonah and Wainaina. Both PW1 and her husband went out and accused was told to say what had happened and they left to go and look for the deceased. At 6.00 a.m. she went to the deceased's house and the next door neighbour, Josephat Kinuthia told her that he had not seen the deceased. At about 7.30 a.m. her husband called her and they found the deceased in her house, in her bed covered with a blanket. The door was locked with a padlock from outside. PW1 opened because she had another key to the mother's house. She said the mother had the only other key. She denied knowing of any disagreement between accused and the deceased but that deceased and accused used to say that Wainaina wanted to kill the deceased; PW1 said that accused sometimes slept in deceased's house and sometimes they slept in his house. She said that Wainaina used to be a friend to the deceased before the accused. She also admitted that the said Wainaina used to stalk the deceased till she would sometimes escort the deceased to the shamba.

Josephat Maweu Kisingu (PW2) was the deceased's husband but he lived in Molo with the children while the deceased lived with her mother in Elburgon. He was informed of the deceased's death by his daughter (PW1). He said that on 1/2/2010 one Wainaina had threatened the deceased and they were summoned to Kapsita Police Station but Wainaina did not show up. Again on 25/6/2010, the deceased called him and asked him to report Wainaina to police station and they agreed to meet at Elburgon Police

Station but deceased did not show up. He denied knowing accused. He identified the body of the deceased to the doctor before post mortem was conducted.

PW3, Ndegwa Wainaina testified that on 29/6/2010 at 7.30 he was at Kapsita shops when he saw a lady by name Wanjiku who was drunk and she asked him to escort her home but he did not. After about 20 paces he met accused going the same direction. There were no other people on the road at the time except the 3 of them. Next day he learnt of deceased's death as they were neighbours.

Dennis Isaboke Nyakenyanya (PW4) owns a bar (Egesa) at Elburgon. On 29/6/2010 about 5.00 p.m. he was selling alcohol when accused went to the bar with Jane and Mama Ciku and he served them with alcohol for about two hours and at 7.00 p.m. he went to roast meat for other customers. He left accused and deceased outside the bar. He knew accused and deceased to be friends as they used to visit his bar frequently. Next day, he saw people gathered at deceased's house, he went there and found deceased's dead body in her bed with injuries to the neck with a knife still lodged in the body.

Elizabeth Nyambura (PW5) stated that on 29/6/2010 she was with the deceased at the bar where they drunk alcohol and they left with her about 8.00 p.m.; that at the door of the bar they met the accused and PW4 arrived at her house while deceased continued with accused. She said that about 9.30 p.m., the accused went to her house trembling and said that they had been chased by Wainaina. She advised accused to go and report at police station. Next morning, PW1 went to ask her where her mother was.

PW6 APC Robert Okwaro who was based at Kapsita Administration Camp recalled that on 29/6/2010 at about 11.40 p.m. the accused went to report that while walking from the shop with the deceased, they were chased by three men and he identified one as Michael Wainaina but they managed to escape. They searched for the deceased that night but did not find her and her house was locked with a padlock from outside. About 7.30 a.m., PW1, reported to them that the body was found in deceased's house and he went to the scene. He said police took possession of the accused's clothes which were said to have spots of blood. They did not get Wainaina that night.

Dr. Alma Akute (PW7) performed a post mortem on the deceased body after the body was identified by PW2. She found there to be decomposition on the site of the wounds and generalized peeling of the skin. The abdomen and face were found to be blotted and scars on the body. The body had 3 wounds on the left side of the neck, right side of the abdomen and the back on chest area – 1 inch long; the left carotid artery was severed and also inferior vena cava was severed. The doctor formed the opinion that the cause of death was due to massive blood loss secondary to stab wounds on the body.

PW8, IP Henry Sindani testified that on 30/6/2010, he received a report from senior sergeant Chacha of a murder in Kapsita. He in turn informed the OCS, who called for scenes of crime and PW8 proceeded to the scene of crime. The house was guarded by Administration Police officers. At the scene he found the deceased's body in bed, a knife lodged in the neck. He learned that the accused had reported to Kapsita police post that he had been with deceased when he was chased by a group of people. They took in accused for questioning and took his clothes that he wore that day for investigation by Government Analyst. He produced in evidence the knife, blue jeans trouser, T-shirt. PW8 noted blood on the accused's clothes but accused could not explain its presence on the clothes. PW8 said he arrested one of the persons whom accused alleged chased them the night before for interrogation but they released him when they found no evidence to connect him to the offence.

The Government Analyst is PW9, Moses Mwaura. He recalled that a kitchen knife, blue trouser jeans and grey/white T-shirt belonging to the suspect James Gachogwa, blood sample of the suspect and blood sample of the deceased were sent to the Government Analyst to ascertain whether the blood stains on the jeans trouser, T-shirt and knife belonged to the deceased or accused. Upon analysis, he found the blood stains on the knife, T-shirt and trouser were blood group 'B' which is the deceased's blood group while the accused's blood sample was found to be group 'O'; that the blood stains on the clothing and knife matched that of the deceased. He produced the report (PEX.7) which contains his findings. He also recognized the exhibits memo form that accompanied the exhibits to the Government Analyst.

In his defence, which was on oath, the accused said that on 29/6/2011, at about 8.00 p.m. he met Nancy Wanjiku who asked him to wait for her so that they could walk home together. On their way home, they met one Kinuthia Wainaina who claimed to have been looking for them and they dispersed and they ran in different directions with Nancy running towards her house while the accused ran to report at APs Camp. He went with APs to the deceased's house but found it locked. They went to Kinuthia's house and found him lighting a fire, he denied seeing the deceased but was picked up and taken to the police station. On the next morning, he met PW1 who asked him if he had seen the deceased but he denied. Later, accused passed by deceased's house to call her so that they would proceed to the place they were working together but he found people gathered at deceased's house. He entered the house and found the deceased had been killed. He was interrogated by police. He claimed that he had anything to do with deceased's death. He denied knowing that the deceased had any relationship with Wainaina. He denied that the police ever took his clothes from him.

Having carefully considered the evidence before the court, there is no doubt and that there was no eye witness to the deceased's murder. This case therefore turns on circumstantial evidence. For circumstantial evidence to found a conviction, it must meet the threshold set out in the case of **Peter v R (1952) AC 489** where Lord Marned said:-

“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.”

In the celebrated case **Rep. V Kipkering Arap Koske & Another (1949) 16 EACA 15**, the East African Court of Appeal held that for circumstantial evidence to found a conviction:-

“the incriminating facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of guilt.”

In the recent case of **Peter Moate Obiero & Gideon Kamau Mburu v Republic, Criminal Appeal No.177 of 2008 (Mombasa)**, the court restated the above position but added that if the safeguards considered in the above cited case are taken into account:-

“...circumstantial evidence is as good as any direct evidence which is tendered and accepted as to prove a fact.”

It means that circumstantial evidence weighed on the scales considered in the above cited cases, it is as good as direct evidence.

There is no dispute that the accused was with the deceased on the night that she disappeared only to be found murdered early next morning. Infact he was the last person to be with deceased and he admitted that fact.

Although the accused denies that there was any relationship between him and the deceased, PW1, the deceased's own daughter told the court that she knew accused to be a boyfriend of the mother and sometimes slept in her mother's house and she would likewise go to sleep in his house. PW4, the owner of the bar where the deceased drank on the fateful evening also confirmed the fact that accused and deceased used to frequent his bar and they were friends. I believe the two witness as to have been truthful. I believe the accused and deceased were friends and that is why PW5, accused's sister confirmed that the deceased did meet the accused at the door and they left together. One just wonders why accused would deny his friend in death.

The accused in his defence stated that one person by the name Wainaina met him while he was in company of the deceased and claimed to have been looking for them he chased them and they parted as accused ran towards the Administration Police Camp and the deceased ran towards her house. PW1 explained that Wainaina had earlier on been the deceased's lover but they had parted. It seems the

accused and the the said Wainaina were fighting over the deceased. PW1 also said that the accused had earlier on alleged that the said Wainaina was threatening to kill the deceased. PW1 also said that the said Wainaina had threatened her mother twice. PW2, the deceased's husband who lived away from the deceased also recalled the deceased telling him that the said Wainaina had threatened her and they even arranged to meet at the police station to try and resolve the issue but the said Wainaina did not turn up. PW5 also told the court that on the fateful night, the accused went to her house later, looked shaken and informed her that Wainaina had chased them and he did not know where the deceased was. The accused made the same report to PW6 the Administration police.

The prosecution did not call the said Wainaina as a witness even though his name was mentioned so many times. PW8, IP Sindani on hearing of the report by the accused, that he had been chased by Wainaina and others, interrogated him at the scene. He said that he also interrogated the said Wainaina when the accused had named the person who chased accused and deceased, but he found no evidence against him. Having been mentioned so adversely so many times, I think it would have been prudent for the investigation officer to call the said Wainaina as a witness so that he can tell the court what happened that night or whether indeed he ever chased the deceased and accused. It is the duty of the prosecution to call all relevant witnesses to their case even if their evidence will tend to be adverse to the prosecution case. In Ahmed **Ahmed Ramson v Rep [1955] EA**, the court said:-

“It is the burden of the prosecution to avail all the material evidence to the court to enable the court arrive at a fair and impartial decision. The prosecution must summon all the material witnesses and avail or furnish the court with all facts even those whose evidence may have been unfavourable for it.”

PW8 told the court that when he visited the scene of crime, that is the deceased's house, where the body had been found in her bed, he found the accused in the crowd and interrogated him. It is then he noticed drops of blood on the accused's clothes and took him for further interrogation and then took possession of the clothes. PW6, APC Okworo who was guarding the scene when PW8 went there corroborated PW8's evidence, that the clothes taken to Government Analyst are the clothes that accused wore on the night he made a report at the AP Camp. The evidence of PW6 and PW8 dislodges the accused's defence that the clothes produced in court are not his. Accused did admit that indeed he was at the scene the next morning when the deceased's body was found. He never told the court that he ever came into contact with the deceased's body. I believe that the clothes produced in court were found on the accused. There is really no reason why PW8 would have picked on the accused to allege the clothes were his when they were not.

PW9 upon analysing the blood on accused's T-shirt and trouser found it to be of blood group 'B', the deceased's blood. Accused's group was found to be group 'O'. PW9 formed the opinion that the blood found on the clothes of accused was that of the deceased. The accused merely denied that the clothes were his but the court finds otherwise. The accused did not explain how the deceased's blood group got onto his clothes if he never came into contact with her after they were allegedly chased by Wainaina. It is accused who was last seen walking home with the deceased and he had a duty to give a plausible explanation as to what happened to deceased after they parted if at all.

According to PW1, there was no evidence of a scuffle in deceased's house meaning the person who murdered her must have entered the house with her and stabbed her. Under **Section 111** of the **Evidence Act**, the accused has a duty, not to prove his case but to give a plausible explanation as to what happened to deceased after they left the bar together because these are facts specially within his knowledge. The accused's explanation that they were chased by Wainaina is totally dislodged by the finding of deceased's blood on his clothes. It is obvious accused took advantage of his rivalry with Wainaina a former boyfriend of the deceased to polish his defence. I am satisfied beyond any doubt that presence of deceased's blood on accused's clothes places him at the scene of the offence. The blood must have spilled on him when he stabbed her and he forgot to get rid of the clothes. Accused tried to cover his tracks by trying to implicate Wainaina but forgot to change his clothe. This court is satisfied that accused is the murderer. The deceased was not stabbed once but had three wounds to the neck, left and right side of the abdomen and the back of the chest area. This is evidence that the assailant wanted the deceased dead and that is proof of malice aforethought.

In the end, I find that though Wainaina was never called as a witness, there is overwhelming circumstantial evidence connecting the accused to the murder of the deceased so that calling Wainaina as a witness was superfluous. The accused had the opportunity to kill the deceased and he did carry it out and managed to come up with a near convincing defence of how Wainaina chased them and followed deceased, diverting the attention away from himself. This court finds that the circumstantial evidence is incompatible with the innocence of the accused and directly points to him as an offender. I find accused guilty as charged and he is hereby convicted as accordingly under **Section 306** of the **Criminal Procedure Code**.

DATED and DELIVERED this 16th day of May 2014.

R.P.V. WENDOH

JUDGE

PRESENT:

M/s Manyara h/b for Mr. Maragia for the accused

Mr. Nombi for the State

Accused- present

Kennedy – Court Assistant