



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

**AT NAKURU**

**MURDER NO. 4 OF 2011**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**PETER NDIRANGU KINYUA.....ACCUSED**

**JUDGMENT**

Peter Ndirangu Kinyua is charged with the offence of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**. The particulars of the charge are that on 19/12/2010 at Mungetho Village in Nyandarua West District, he murdered John Mwita Njoroge. He denied the offence. The prosecution called a total of 11 witnesses in support of their case. The accused was called upon to enter his defence and testified on oath and called one other witness.

PW1, Margaret Wairimu Kinyua was the wife of the deceased and a foster mother to the accused. She said that she left her husband at their home in Mungetho on 18/12/2010; that her son Peter Ndirangu, the accused had left the home for Nairobi on that morning but his younger brother, Mwangi and Mathenge were left at home. She had gone to pay workers in their other farm. About 8.00 p.m. she received a call from neighbours telling her to go back home as something had happened. She arrived back home at 9.00 a.m. next day did not see the husband but found her children; Mwangi (PW2 and Mathenge but that the accused had gone to Nairobi. She was taken to Ol Jororok Police Station where she was informed that the deceased had been murdered. She denied that there had been any problem between the deceased and Ndirangu (accused) before he left home for Nairobi.

PW2, James Mwangi Kinyua, who was aged 15 years is a brother of the accused person. He testified that on 18/12/2010, at about 8.00 p.m. he heard his parents discussing sale of a cow and they could not agree on what to do with the proceeds. Next day on 19/12/2010 was his day to milk cows; he woke up at 6.00 a.m. with the brother Mwangi. He said that Ndirangu bathed and left home on that morning. Later, he went to graze cattle, returned at 11.00 p.m., went to watch football and returned at 5.00 p.m., went to tend to the cattle and about 6.30 p.m. when entering the kitchen, he saw the door to the house open, found the father on the sofa, tried to wake him up but he did not. He went to call a neighbour to try and help wake the father. He never saw the accused from then till he saw him in court. He denied there having been any quarrel between the accused and deceased there before.

PW3, Mwangi Mathenge, is a neighbour of the deceased and a village elder in Mungetho. He recalled the 19/12/2010, when he was informed that he was required by James Mwangi, a son of John Kinyua who informed him of the death of John Mwita. PW3 proceeded to the home. On entering the house he found John Mwita's body on the sofa and he had an injury on the neck, head and there was blood on the walls and sofa. He called the OCS of Ol Jororok Police Station who came for the body. He denied having

heard of any dispute between deceased and Ndirangu. He explained that Ndirangu and his two brothers were sons of John Kinyua who had died 4 years before and deceased who used to work for them had taken over the wife and home. When at the home, a woman by the name Wanjiku also informed him that the accused had borrowed a panga from her home at about 1-2.00pm of that same day. He told the court that earlier on, he had received a report from PW1 about the deceased going home drunk and beating her with the children and they had had to run away and sleep in another person's home.

PW4, Paul Chege, recalled that on 19/12/2010, about 2.00 p.m. he was at home when accused who was a neighbour came and asked him for a file to sharpen his panga and that he had the panga which he sharpened and returned the file to him and left and he did not see where accused went.

Dr. Frederick Kariuki (PW5) who was based at Nyahururu District Hospital performed the post mortem on the deceased on 28/12/2010. He found that the deceased's trachea was cut through and major vessels that supply blood to the heart had been cut; there was a skull fracture on the left side of head and accumulation of blood on the left side of the brain; the spinal code was cut along the 4<sup>th</sup> cervical vertebrae. He formed the opinion that the cause of death was exsanguination or bleeding from wounds inflicted by a sharp object. He produced the post mortem report (PEX.2).

PW6, PC Alan Seng'eli, with Cpl Mary Nkirote (PW11) the investigation officers, were instructed by their OCS to visit the scene of the murder at about 10.00 p.m. on 19/12/2010. On arrival at the home, they found the deceased's body on the sofa with a deep cut on the neck, blood splashed on the walls and floor. They learnt that PW1 away, were informed accused had left about 6.00 p.m. but found PW2 and another child.

PW6 did not see any evidence of breakage into the house. He interviewed neighbours who included PW4 from whom accused was said to have borrowed a file, and another neighbour from whom accused was said to have borrowed a panga. Later, PW1 led them to Nairobi where they arrested the accused at the bus stage. PW6 further told the court that Chief Inspector Ogolla took a statement under inquiry from accused but the same was not produced in evidence. He produced the file PEX.1.

PW7, CIP Alan Ogola did not complete his testimony because the prosecutor applied for time to call witnesses in a trial within a trial. The witnesses included PW8. PW8, Samuel Ngumo who also stepped down before he completed his testimony and later counsel intimated that she no longer wished to call the said witness. The evidence of those witnesses (PW7 & 8) being incomplete cannot be considered as part of the prosecution case and will therefore be omitted in this judgment.

PW9, Jerioth Mukami is a neighbour of the accused. She recalled that on 19/12/2010 she was sleeping in the house when accused went there and asked her for a panga. She did not see him but knew him by his voice. She told him to take the panga from where it was normally kept. She said she recognized his voice because they have known each other for long, since childhood. She was shown a panga in court and she identified it as the panga that accused borrowed but could not confirm whether it is the same panga that was borrowed.

PW10, Daniel Wamitu, the father of PW9 recalled that on 19/12/2010, he arrived home about 6.00 p.m. and asked the daughter where his panga was and she informed him that the accused (Ndirangu) borrowed it. After a short while he heard noises outside and on enquiring found out that the deceased had been murdered. He denied having got his panga back from Ndirangu (accused). He identified the panga produced as PEX.3 as his.

PW11, the investigation officer who was with PW7 reiterated the testimony of PW7 save that she did not tell the court whether the accused led to recovery of a panga and file. She only talked of the recovery of the panga.

Accused in his unsworn evidence told the court that he is 23 years old and denied murdering his father. He told the court that on 18/12/2010, he went home from a friend's house at about 9.00 p.m. found his father, mother and brothers. After eating found, he told his mother that he wanted to visit his aunt (DW2)

in Nairobi. The mother did not have money but she sent him to somebody at Ng'arua to give him fare. On 19/12/2010 he left the home about 11.00 a.m. The person gave him money and he left for Nairobi arriving there about 2.30 p.m., found the aunt and they went home together. After some weeks, the mother called him and told him to wait for her at Nyamakima stage where she arrived with people who arrested him. He was surprised at the allegation that he murdered his father.

DW2, Anne Wanjiku Kamau, a sister to PW1, told the court that on 19/12/2010, the accused called her and informed her he wanted to visit her as he normally did over school holidays. He informed her upon arrival and they stayed together till 4/1/2011 when PW1 called her and informed her that she was coming to Nairobi. The accused also called her from the house and informed her that PW1 wanted him to meet her at Nyamakima stage. After that she could not get them on phone till 5/1/2011 when she learnt that accused had been arrested.

I have considered all the evidence adduced in this case and the submissions of counsel. There is no doubt that this case turns on circumstantial evidence because nobody witnessed the murder of the deceased. There is indeed sufficient evidence, that the deceased was murdered. PW5 found cut wounds on the head and the neck and the body was found on a sofa chair in deceased's own house. Nobody knows exactly when the murder took place. The question that the court has to determine is whether the circumstantial evidence against the accused meets the threshold that can found a conviction. There is settled law on the threshold of evidence that can found a conviction as has been espoused in a host of authority which includes **Kipkering Koske v Rep. (1949) 16 EACA 15**. In that case, the court said:-

**“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.”**

I do agree with the submission by the defence counsel that the onus rests on the prosecution to prove the guilt of the accused person beyond any reasonable doubt. In doing so, the prosecution has to prove the three ingredients, that constitute murder; the cause of deceased's death, that it is the accused who committed the unlawful act and that the accused had malice aforethought (see **Rep. v Nyambura (2001)KLR 355**).

PW5, the doctor who conducted the post mortem on the deceased found the deceased to have sustained a cut on the trachea/wind pipe/severing most of major vessels; fractured skull and cut of the fifth cervical vertebrae (neck). He formed the opinion that the cause of death was exsanguination (injuries) due to assault with a sharp object. The injuries were obviously inflicted by somebody else and the ultimate question will be, who did it.

PW2, found the deceased already dead, on a sofa set. PW3, the village elder who was called to the scene confirmed that he saw the said injuries and the deceased's body lay on the sofa set, in his house.

PW6, who visited the scene with the investigation officer, PW11, reiterated what PW2 and PW3 said. He also said that they looked at the house where deceased's body lay but there was no evidence that anybody had broken into the house or forced entry.

According to PW1, the accused's mother, the accused left home for Nairobi on 18/12/2010. The accused and DW2 stated that accused actually arrived in Nairobi on 19/12/2010. The accused told the court that he left home for Nairobi about 11.00 a.m. However, PW4, Paul Theuri told the court that on the same day, 19/12/2010, at about 2.00 p.m., the accused went to his home and borrowed a file from him to sharpen a panga and that he did give him the file and accused sharpened the panga. The defence did not dispute or challenge or dislodge the evidence of PW4 in any way. I have no reason to doubt the evidence of PW4. It means that the accused had not left Mungetho village on 19<sup>th</sup> December 2010 by 2.00 p.m.

We then had the evidence of PW9, Jerioth who told the court that on 19/11/2010, the accused went to their house to borrow a panga. Though she did not know the time of day and did not see him, she heard his voice. She had known the accused since their childhood as they used to play together. PW9 is physically impaired and that may explain why she did not come out of the house to see accused. PW9

informed PW10 that the accused had borrowed their panga. PW10 said he never saw the panga again till it was recovered later by the police. He identified the panga that was produced in court as his (PEX.3).

Having seen these three witnesses PW4, PW9 and PW10 in court, the court has no doubt that they were truthful witnesses. PW3, the village elder was also informed of the accused borrowing the panga and file when he went to the scene soon after the murder was discovered. PW10 identified the panga (Ex.3) as his as he had fixed the plastic handle himself. It is possible for one to identify his property even if it has no special mark or name.

The panga (PEX.3) was recovered near the grave of accused's father where the accused led the police after his arrest. Although PW6 told the court that they recovered both the file (Ex.2) and panga together, I think he was exaggerating because PW4 clearly told the court that the accused used the file and left it behind and that later the police went for it. Both PW6 and PW11 were consistent that accused led them to recovery of a panga in their shamba. PW6 specifically said the panga was found near the accused's father's grave. PW3 and PW4 explained that the deceased's father had died and the deceased was accused's foster father. There was not a shred of evidence why the police officers would have framed accused with leading them where the panga was found. The panga was identified by PW10 as his. I am satisfied beyond any doubt that the panga produced in court as an exhibit (PEX.3) is the one borrowed from PW9 on 19/12/2010 by accused and he did not return it to PW9 till it was recovered after accused's arrest.

Accused's defence is an alibi, that he was away in Nairobi when the murder took place. I have believed PW4's evidence that the accused was still at his home at about 2.00 p.m. on 19/12/2010. I do not therefore believe that he had left Mungetho at 11.00 a.m. Nobody can tell exactly when the murder took place. DW2 cannot tell what the accused did back home on 19<sup>th</sup> December 2010. The plan to visit DW2 was not known till that same day on 19/12/2010. The evidence of PW4 which was uncontroverted totally displaced the accused's alibi that he had left home by 11.00 a.m. on 19/12/2010. The fact that accused also borrowed a panga, sharpened it and thereafter disappeared and has not given any plausible explanation as to what he intended to do or what he did with them. Accused is not required to prove his case but only needs to give a reasonable explanation of what happened which he failed to do. The accused then vanished from home for over three weeks till his mother led to his arrest in Nairobi. His conduct is telling. I believe he did not go for holiday in Nairobi but was running from the crime he had committed and that conduct confirms his guilt.

The accused's counsel submitted that PW1 was also suspect having quarrelled with the deceased the night before. According to PW1 and PW2 there was indeed a discussion or argument between the accused and the deceased over what they would use the money raised from sale of a cow. They never said it was a quarrel. It is PW3 who told the court that earlier on, PW1 had informed him about the deceased getting drunk, beating her up and the children and chasing them from the home so that they spent the night in the neighbour's house. It was not disclosed when this incident occurred. That incident could be reason enough for any of those affected, PW1 and the children to plan revenge against the deceased. However, in murder cases, what is required is not motive for the murder but malice aforethought. Malice aforethought is defined in **Section 206** of the **Penal Code** as intention to cause death of or do grievous harm to any person, or intention to commit a felony and knowledge that the act or omission causing death will possibly cause death or grievous harm to some person.

I have already referred to the evidence of PW5 who performed the post mortem on the deceased. The deceased had not one cut wound but three, which were inflicted on very vital organs of the body, the wind pipe, skull and spine or neck. The intention of the assailant was clear, to kill him. The injuries inflicted on the deceased are evidence of malice aforethought.

In the end I am convinced beyond any doubt that the circumstantial evidence considered herein, directly points at the accused as the murderer and none else. I find him guilty of the offence as charged and convict him accordingly under **Section 322(1)** of the **Criminal Procedure Code**.

**DATED and DELIVERED this 1<sup>st</sup> day of October, 2014.**

**R.P.V. WENDOH**

**JUDGE**

**PRESENT:**

Ms Abuga for the accused

Mr. Chirchir for the State

Kennedy – Court Assistant