



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL CASE NO. 13 OF 1994

REPUBLIC.....STATE

VERSUS

MWARAGE.....ACCUSED

JUDGMENT

The accused is charged for murder of Mary Wamaita Mwathi on the night of 27th/28th January, 1993 at Tinganga village in Kiambu District of the Central Province.

It is not in dispute that the accused and the deceased were very close friends. The deceased, about 45 years old lived alone and the accused was her frequent visitor.

According to the deceased's son, Anthony Mwathi (PW4) the accused and the deceased went to him on 27th January, 1993 at about 8 pm at the butchery where he worked. They – all three – drank beer till about 11.30 pm and went to the deceased's house.

Mwathi (PW4) continued to say that he himself left her house and went to drink 'muratina' and the accused soon joined him in drinking.

At about mid-night his mother, the deceased called him and gave him food. After eating he left her.

The next morning he went to his mother's house but did not find her. He found her house locked from outside and two children – his brother Kamau aged about five years and Njoroge – outside the house having come out of the house through a window of the house. He took them to a hotel for breakfast.

The witness (Mwathi) added that upon looking through the window he found that the things in the house were scattered all over. A stool belonging to her mother was found near a borehole about 15 to 20 feet behind the house of the deceased. Later the police removed the deceased's body from the borehole.

Margaret (PW5) has her house next to that of the deceased separated only by an iron sheets wall.

According to Margaret on the night in question at about 1 am she heard the voice of the accused who was knocking on the deceased's door asking her to open it. The deceased refused to open and the accused kicked it open as its hinges became loose. She knew that there was a cupboard next to the door and as the accused kicked open the door she heard the noise of the contents of the cupboard falling.

According to this witness (Margaret) the accused started fighting with the deceased upon entering the

house and she heard the deceased asking the accused to leave the house saying he had destroyed her property. She (Margaret herself) shouted from her house asking the deceased what was happening and the deceased asked her to go there to see the damage but she did not go as they used to fight frequently.

Later, according to Margaret the accused and the deceased came out of the house and when one of the children of the deceased also came out the accused asked him to go back and as the child did so the accused locked the house from outside.

The next morning Margaret found the door still locked and the deceased's children outside having come out through a window.

At around 10.00 am she (Margaret) saw a stool near the borehole and found the borehole covered with some leaves and pieces of wood. She spoke to neighbours who gathered there. Someone went in the hole to find that there was a human body in it. The headman and the police were informed. The body was taken out of the hole and identified as to be of the deceased.

The evidence of Susan (PW 8) is that the accused and the deceased went to her house on the night in question (27th January, 1993) at about 10.30 pm and drank '*muratina*'. Mwathi (PW 4), the deceased's son also joined them in drinking it. The accused and the deceased left her (Susan's) house first and after a while Mwathi also left.

According to Susan the deceased went back to her, borrowed a box of

matches from her and went away. She (Susan) soon saw the accused at her (Susan's) door. He told her that if he asked her to open her door she should do so as it was his request to her. She agreed and the accused went away to the deceased's house.

Susan further testified that she heard the accused asking the deceased to open her door and that when she (deceased) refused the accused forced it open and went in. She then heard them quarrelling and fighting and then coming out of the house. Then as the deceased's son aged about 5 years came out crying the accused asked him to go back and sleep. He complied and the accused locked the door from outside.

Susan went on to say that the next morning Margaret found a stool near the borehole and called them. She went there and found the hole was uncovered and only pieces of branches and wood at its mouth. She added that previously for long time the hole was covered. The headman and police came and the body was removed from the hole the next day. It was of the deceased. Her (Susan's) house was 4th from the deceased's and could hear what happened at the house of the deceased.

The accused made his defence on oath denying the charge. He admitted that the deceased was his girl friend and they were drinking together in a bar on the night in question. However, according to him after they left the bar at about 10.15 pm he was in front of the deceased and as they passed by the house of Susan (PW8) the deceased stopped and started talking to Susan and he went away leaving her there. He went to his house, ate and slept.

The accused denied going to the deceased's house that night or quarrelling or fighting with her. He added that Margaret and Susan told lies.

Mrs Njogu, the learned advocate for the accused submitted that the charge against the accused was not established. She argued that the photographer spoke of a mud house whereas evidence was of timber. In fact it was of iron sheets. Further that since the doctor (PW6) did not find any visible external injury during the post mortem examination the deceased might have fallen in the borehole when drunk and died. She pointed out that the doctor admitted that a fall could have caused the injury on her head.

The learned advocate also said that the son (PW4) earlier said that his mother drank soda but later admitted that she drank '*muratina*' and he be not believed.

Attacking the evidence of Margaret and Susan the learned counsel stated that both of them told lies because they could not have seen what happened outside because none of the said two witnesses came out of their houses that night.

Mrs Ondieki, the learned state counsel submitted that the prosecution evidence was consistent and the discrepancies, if any, were not material. She went on to point out the close relationship between the accused and the deceased and they being together that night further referring to the fact that the photographs showed the disturbed things in the house.

The assessors unanimously opined that the accused, was not guilty of any offence. In their opinion the deceased may have fallen in the borehole accidentally, that the prosecution evidence was inconsistent, the doctor found no bruises on the deceased's body and that they were all drinking that night.

I have carefully considered the evidence, submissions and the conclusion reached by the assessors.

It is not in dispute that the deceased was the accused's girlfriend since long. The accused admitted that they drank beer together in a bar that night and left the bar together. According to the accused when on their way the deceased stopped to talk to Susan (PW8) and he (accused) left the deceased there and went away.

The evidence of Mwathi (PW4), the son of the deceased in the early part thereof was that they all three, ie the deceased, the accused and himself had been together that night and that later when the accused and himself drank '*muratina*' the deceased was not with them.

During cross examination, Mwathi said that the deceased took only soda and not beer. However, he soon changed his evidence and admitted frankly that the deceased, his mother also drank beer and had later drunk '*muratina*' with him and the accused.

Mrs Njogu for the accused has referred to the above self-contradiction in Mwathi's evidence and I have considered it. However, in view of Susan's (PW8) evidence that the deceased, the accused and Mwathi had '*muratina*' together in her house and accepting her evidence as nothing but the truth I find that all the said three drank '*muratina*' together as indeed so admitted by Mwathi in the later part of his evidence stated hereinabove. I do not believe the accused when he denied drinking the *muratina*. The over all

impression Mwathi gave me is that he is a witness of truth inspite of the above difference in his evidence. He finally agreed about the mother (deceased) having had beer and *muratina*. He probably wanted to improve his mother's image and no more.

On the issue whether or not the house was of mud, timber or *mabati* the photographer (PW3) admitted that it was a long time ago that he took the photographs (taken on 9/1/93) and may have made a mistake. In my view the issue is not of any importance.

Turning to the doctor's evidence on he having seen no visible internal injury on the body of the deceased I am of the considered view that the said evidence may not be correct and in any case I do not see how it helps the accused. In raising this point Mrs Njogu for the accused said that since there was no external injury the prosecution evidence from Margaret and Susan to the effect that the accused and the deceased were fighting that night was a lie. The learned lady advocate took the advantage of what the doctor stated and canvassed the issue most earnestly and fervently. However, nothing turns on this. It is to be noted that neither Margaret nor Susan at any place in their evidence stated anything on the actual manner the accused and the deceased fought. Both the said ladies were honest in saying that they were in their respective houses at the time that night. Further many times there may be fights, combats, struggles between two people resulting in no injury to either. It depends. In the instant case the body of the deceased was taken out of a deep borehole with an effort and possibility of some lacerations or bruises in the process may not be ruled out.

Further evidence of the doctor said that upon internal examination he found that the deceased had blunt

head injury with intracranial haemorrhage. There was injury of the brain as well. A blunt object with moderate force would cause such injuries. The cause of death in his opinion being intracranial haemorrhage and the brain injury.

During cross examination the doctor said that a fall from a height will also cause such head injury.

The contention of Mrs Njogu accepted by the assessors that the deceased may have fallen into the borehole does not stand on scrutinising the evidence. A fall into it won't be from a height. Susan (PW 8) stated that the borehole had previously remained closed. On the morning following the night of the incident she found the mouth of the hole covered with branches and pieces of wood. Surely after one falls into it one won't have

a chance to cover it as found nor one would do it. I find that the deceased was killed.

I now turn to the evidence of Margaret (PW 5) and Susan (PW 8). Their evidence speaks for itself. The said two ladies lived not far from the house of the deceased. They knew the accused and the deceased for long. As such they were familiar with their voices. Margaret is a next door neighbour of the deceased. Susan lived in the fourth house from that of the deceased and not far away.

It is common knowledge that when two people in a close neighbourhood are shouting, quarrelling and fighting with each other one so familiar, as these two gentle ladies with them would at once know all about it through the medium of one's senses. More so, when this happens when all else is quiet at night as was the case here.

I find the evidence of Margaret and Susan most coherent and cogent. I observed them carefully. They impressed me as honest and truthful. There exists no reason for them to lie. I am contended that they spoke the truth and I accept their evidence. I reject the accused's defence as false.

I am fully aware that the evidence against the accused is circumstantial as can be seen. Also that such evidence to base a conviction against an accused must be such that the inculpatory facts against an accused must be incompatible with innocence and incapable of explanation upon any reasonable hypothesis than that of his guilt.

In the instant case for the reasons already given I find it established that the accused and the deceased were shouting, quarrelling and fighting that night soon after the accused tried to gain the forceful entry into the deceased's house and all was quiet after the incident. The next morning the body of the deceased was found dumped in the borehole with the mouth of the hole covered. In all the circumstances taking the evidence as a whole the inference is irresistible that the deceased was killed by the accused and I so find. The accused then hid her body in the borehole which he covered up.

Is the accused guilty of murder on the evidence as it stands? The deceased and the accused imbibed beer and '*muratina*' not long before the quarrel and the fights. Both, it is reasonable to presume, must have been drunk to some extent at the time. No one saw how was their fight. Could it not be that during the fight the deceased may have tried to push the accused or pushed the accused who thereupon hit the deceased with something

on her head not intending to kill her? The blow may well not have been aimed on the head. The accused did not speak on this at all but in my view it is my duty to consider such a possibility bearing in mind the nature of the evidence. The possibility does exist. The accused killed the deceased unlawfully but did not intend to kill her. I find the accused guilty of manslaughter and convict him for it.

Dated and Delivered at Nairobi this 7th day of June 1994.

V.V.PATEL

JUDGE