

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYERI**

**HIGH COURT CRIMINAL CASE NO. 8 of 2019**

**REPUBLIC.....**

**PROSECUTOR**

**-VERSUS-**

**BEAUTAH KAMBO WAHOME.....**

**ACCUSED**

**JUDGEMENT**

1. The Accused **BEAUTAH KAMBO WAHOME** was charged with the offence of **MURDER CONTRARY TO SECTION 203 as read with SECTION 204 of the Penal Code**. The particulars of the charge were that

**“On the 23<sup>rd</sup> day of June 2019 at Kirichia Village in Kiganjo Location within Nyeri County murdered Godfrey Nderitu Muhinja”**

2. The Accused entered a plea of **‘Not Guilty’** to the charge and his trial commenced on **30<sup>th</sup> October 2019**. The prosecution called a total of **Seventeen (17)** witnesses in support of their

case. This is a very old matter which commenced before **Hon. Justice Ngaah** who heard **eight (8)** witnesses. Thereafter **Hon. Lady Justice Muchemi** took over the case and heard the remaining nine (9) witnesses. Following the transfer of **Lady Justice Muchemi** I took over the matter and heard the defence of the accused.

### **THE EVIDENCE**

3. **PW1 SOLOMON NDERITU KINGONGI** told the court that he is a resident of Kirichu village where he works as an electrician. On **23<sup>rd</sup> June 2019**, **PW1** was called by his uncle and informed that the Deceased and another of his uncles had been assaulted at the farm. **PW1** went to the farm and found the deceased lying on the ground. He found **Kambo** (Accused) and his uncle called **Wanjohi** at the scene.
4. According to **PW1** he noted that the Deceased had been badly assaulted and his clothes were soaked in blood. Upon enquiring on the reason for the assault the Deceased's uncle stated that they had caught the accused stealing from their home. **PW1** requested that they rush the Deceased to hospital but was told to wait for the police to come. **PW1** then went

home to collect clothes for the Deceased to wear. It started to rain and they all moved to the veranda of the Accused's home to take shelter. Police came at about 7.00pm, two (2) hours after the assault had occurred. The Deceased was put in the police vehicle and rushed to hospital. The others went to Kiganjo Police Station where they recorded their statement. Meanwhile the Accused was taken to Tumu Tumu Hospital where he was admitted. The accused succumbed to his injuries at the hospital and passed away at **Tumu Tumu Hospital**. **PW1** later took the blood stained clothes of the deceased to the police station.

5. **PW2 PATRICK WARUHIU KUYUKIA** told the court that he was a resident of Gachigu village. He states that on **23<sup>rd</sup> June 2019** at about 5.00pm he received a call telling him to rush to the farm. Upon arrival **PW2** found the deceased lying beside the road with his hand tied bleeding from his head. The deceased was semi-conscious. Members of Public at the scene stated that the deceased had been caught trying to steal from the home of one '**Karicho**'. The accused who was at the scene told **PW2** that he is the one who had beaten the Deceased.

Later after hearing that the Deceased had died **PW2** went to the police station and recorded her statement.

6. **PW3 MICHAEL KABUTHU GICHOHI** is from Kirichu Village. He told the court that on **23<sup>rd</sup> June 2019** which was a Sunday he and the Deceased worshipped together at the Orthodox Church. After the service ended at 11.00am each left to their respective homes. Later as the witness walked past the compound of the Accused he heard the accused shout '**MWIZI**' or '**Thief**'. Upon enquiry the accused told **PW3** that he had locked up the deceased who was a thief inside his house. However **PW3** did not himself see the Deceased. **PW3** proceeded on his way. He later learnt that deceased had been beaten and been rushed to hospital where he died. **PW3** then recorded his statement.

7. **PW4 LUCY WANGUI WAMBUI** stated that she lives in Gachigu Village. She stated that on **23<sup>rd</sup> June 2019** her daughter **Catherine Waitherero** came home and informed **PW4** that her uncle the deceased had been beaten up because he was attempting to steal from the home of the accused. Together **PW4** and her daughter went to the accused's compound where

they found the deceased seated at the Veranda. The deceased was severely injured and could not stand up. They waited for police to come.

8. **PW4** states that whilst at the Veranda she saw the accused armed with a thick stick about 2 inches in diameter. When police came they took the deceased to hospital. **PW1, PW4** and others carried the deceased into the police vehicle. The deceased was admitted at Tumu Tumu Hospital where he succumbed to his injuries and died.

9. **PW5 DOMINIC MUTHIGARI told** the court that he lives in Kirichu

Village and is a farmer. He states that on **23<sup>rd</sup> June 2019** at about 8:30am the deceased who is his brother-in-law left to go to church. That the deceased returned home at 2.30pm. At about 4.00pm the deceased left the compound. At 5.00pm one "**Wangare**" came screaming and told **PW5** that the deceased was being killed by the accused. **PW5** and his mother rushed to the scene. They found the deceased seated by the roadside with his hands tied up. The deceased was bleeding from the head. **PW5** untied the deceased but was prevented from

taking him to hospital by accused who insisted that they must wait for the police to arrive. Later it began to rain and deceased was moved to the house of accused. Police eventually arrived at 7.00pm and took the deceased to hospital. **PW5** says that he found accused holding a big wooden stick. The witness identified the clothes which the accused was wearing on that day. He later recorded his statement at the police station.

10. **PW6 CATHERINE WAITHERERO WARUI** told the court that she

resides at Gachiga Village. She told the court that she knew the

accused as a fellow villager and that the Deceased was her uncle. **PW6** states that on **23<sup>rd</sup> June 2019** at about 6.00am her father received a phone call and then informed them that the deceased had been beaten up allegedly for stealing.

**PW6** rushed to the scene with her mother. She found **PW1** and **PW5** there. They found the deceased seated in the accused's veranda. The deceased was bleeding and his clothes were torn. Police later came and took the deceased

to hospital. The deceased was admitted at Tumu Tumu Hospital where he died. **PW6** later wrote her statement.

11. **PW7 JOHN KARIUKI MWANIKI** stated that he was a resident of

Kiricho Village. He told the court that he knew the deceased from their childhood and stated that the deceased often suffered bouts of depression. **PW7** told the court that on **3<sup>rd</sup> July 2019** he went to the mortuary where he identified the body of the deceased for purposes of post-mortem examination.

12. **PW8 ANNA MUTHONI MWANGI** told the court that the deceased

was her neighbour. She states that on **23<sup>rd</sup> June 2019** at about

3.00pm she was walking home with one '**Njeri**'. They heard a

commotion and went to check. They found the accused beating the deceased saying that the deceased was a thief.

**PW8** told the accused that he should have called the police instead of beating the deceased. **PW8** then proceeded on

her way because the accused told her that police had already been called.

13. **PW9 PHYLLIS WAIRIMU KAHURI** told the court that the accused

was her relative. She states that on **23<sup>rd</sup> May 2019** at about 6.00pm whilst on her way home from church she heard a commotion. She went to check and found deceased lying on the ground. The accused was holding a stick and was beating the deceased and stepping on him. **PW9** told the accused to stop beating the deceased, whilst the deceased was pleading for his life. Later **PW9** heard that the deceased had passed away.

14. **PW10 PATRICK KINGANGI MUHINJA** told the court that the

deceased was his brother. He stated that on **24<sup>th</sup> June 2019** at 8.30am he received a call informing him that the deceased was admitted at Tumu Tumu Hospital. **PW10** went to the hospital but found that the deceased had already passed away. Later on **3<sup>rd</sup> July 2019**, **PW10** went to the

mortuary where he identified the body of the deceased for purposes of the post-mortem.

15. **PW11 PC PAUL WAMBUA, PW13 SAMSON KIPCHUMBA**  
and

**PW14 IP ANDREW KIBET** were all officers attached to Kiganjo Police Station. They told the court that on **23<sup>rd</sup> June 2019** the mother of the accused came to the police station and reported that a man had entered her house with intention to steal. The officers then went to the scene at Gachika Village. Upon arrival he found a man who had been severely assaulted and was bleeding profusely. The accused was also at the scene holding a stick. **PW11** took the injured man to hospital and recovered the stick from the accused. After the death of the deceased police arrested the accused.

16. **PW12 STEPHEN KAMUTU WANJOHI** is a cousin to the accused.

He states that on **23<sup>rd</sup> June 2019** at about 3.00pm he went to the home of accused where he noticed a stranger roaming around. The accused chased the man and struggled with

him. **PW12** left on a motorcycle and went home. He later heard that the man had been killed.

17. **PW15 PC ERIC MACHANJA** was the arresting officer.

18. **PW16 DR WILLIAM MURIUKI** is the doctor who produced the Post mortem report **Pexb 1**.

19. **PW17 CORPORAL MICHAEL NJAGE** was the investigating officer.

He produced in court the various exhibits recovered at the scene which included the following;-

- (a) Two sticks – Pexb 6 and 7
- (b) One Jembe handle – Pexb 8
- (c) Black trouser – Pexb 4

Blue Shirt - Pexb 5

Stripped T-shirt Pexb 6

Socked Vest }

Upon completion of investigations the police charged the accused with the offence of murder.

20. **PW18 DR MOSES MWENDA** is a consultant psychiatrist who

examined the accused and found that he was fit to plead.

The doctor

produces the medical report dated **27<sup>th</sup> June 2019** as an exhibit **Pexb**

**9.**

21. On **10<sup>th</sup> April 2025** the court delivered a ruling in which the accused

was found to have a case to answer and was placed on his defence.

22. The accused opted to give a sworn defence in which he denied having assaulted and killed the Deceased. The accused told the court that on the material day he was inside his house when the deceased came, opened the door and entered the house. The deceased then unplugged a TV set. The deceased began to walk away with Tv set. The accused says that he and his cousin apprehended the deceased and put him in a room. The deceased escaped from that room and ran outside. That a mob caught the deceased and lynched him.

### **ANALYSIS AND DETERMINATION**

23. I have carefully considered the evidence adduced by the prosecution

witnesses, the defence put forward by the Accused as well as the

written submissions filed by both parties.

24. The accused faces a charge of Murder which is provided for by **Section**

**203** of the **Penal Code** as follows:-

**“Any person who of Malice aforethought causes death of another person by an unlawful act or omission is guilty of Murder.”**

25. From the above definition arises the three (3) critical ingredients of the offence of murder all of which must be proved by the prosecution in order to secure a conviction. These are

**(i) Proof of the fact and cause of death of the Deceased.**

**(ii) Proof that the Deceased met his death as the result of an unlawful act or omission on the part of the Accused.**

**(iii) Proof that said unlawful act or omission was committed**

**with malice aforethought.**

26. The standard of proof in all criminal cases is proof beyond reasonable

doubt. The burden lies upon the prosecution to prove all elements of the offence of Murder beyond reasonable doubt.

27. In the case of **MILLER -VS- MINISTRY OF PENSIONS [1947] 2**

**ALL ER, Lord Denning MR** described 'proof beyond reasonable' in

the following words.

**"That degree is well settled. It need not reach certainty but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote**

**possibility in his favour which can be dismissed with the sentence or course it is possible but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice.”**

28. All the witnesses who knew the deceased as a fellow villager identify him as ‘Godfrey Nderitu Muhiga. PW10 Patrick Kangangi Muhiga a brother to the Deceased and PW12 a cousin to Deceased both told the court that on 3<sup>rd</sup> July 2019 they went to the Mortuary in Nyeri where they identified the dead body of the Deceased.

29. On the question of the fact of death of the Deceased there can be no doubt. All the prosecution witnesses testify that after being assaulted the Deceased died at Tumu Tumu Hospital.

30. Equally there was no controversy regarding the cause of death of the deceased. All the prosecution witnesses testify that on **23<sup>rd</sup>**

**June 2019**

the deceased had been badly assaulted on suspicion that he was a thief.

All the witnesses describe having seen the deceased badly battered and

bleeding from assault wounds. **PW11, PW13** and **PW14** the officers

who visited the scene also confirm that it was they who took the

deceased to hospital for treatment.

31. **PW16 Dr. William Muriuki** confirmed that an autopsy was conducted

on the body of the Deceased. He produces the post mortem report as

an exhibit **Pexb 1**. The pathologist who conducted the autopsy noted

multiple bruises on the upper and lower limbs, on the chest abdomen

and back. The doctor also noted a left parietal haematoma on the head

with internal injury. The cause of death was opined to be  
**“severe head  
injury due to blunt force trauma secondary to assault.”**

32. This evidence regarding the cause of death was expert  
medical evidence

which was neither challenged nor controverted by the  
Accused. I find

as a fact that the deceased met his death due to the severe  
beating

which he was subjected to on **23<sup>rd</sup> June 2019**.

33. **“Actus non facit reum nisi mens sit rea”** is a fundamental  
legal

maxim meaning that an act does not render an individual  
guilty unless

the mind is also guilty. This latin maxim gives rise to the two  
critical

elements of a criminal offence i.e the **‘actus reus’** which is  
the unlawful

act and the **‘mens rea’** which refers to the guilty mind.

Having proved

the fact and cause of death the prosecution is under an obligation

to prove the '**actus reus**' or the wrongful act committed by the accused

which led to the demise of the deceased. The prosecution must prove

that the accused was the one or was amongst the persons who fatally

assaulted the deceased.

34. As stated earlier the prosecution called impressive **seventeen (17)**

witnesses. Yet out of these **seventeen (17)** witnesses only one (1)

claimed to have actually witnessed the accused assaulting the deceased.

Most of the witnesses state that upon arrival at the scene they found the

deceased seated having already been badly beaten and that the accused

and his uncle were also at the same scene.

35. **PW1** told the court that when he arrived at the farm he found the

deceased lying on the ground badly injured and the accused and his uncle

called '**Wahome**' nearby. **PW1** did not see how the deceased sustained

his injuries. He did not specify who between the accused and his uncle

assaulted the deceased.

36. **PW2** stated that upon arrival at the scene he found the deceased

bleeding from the face and head. **PW2** says he found accused with other

villagers at the scene. He did not see anyone assault the deceased.

**PW2** states that the accused told him that he had beaten the deceased.

This evidence if true would amount to a confession and would only be

admissible if made in line with the provisions of the Law relating to the

recording of confessions to wit Section **25A** of the **Evidence Act Cap 63**

**Laws of Kenya.** The prosecution did not produce in court any written

confession signed by the Accused. Thus the evidence of **PW2** is not admissible as proof of the guilt of the accused.

37. **PW5** and her mother **PW6** both went to the scene. They state that they

found accused badly injured seated beside the road with her hands tied.

Neither **PW5** nor **PW6** saw the accused or any other person beating the deceased.

38. The other witnesses all saw the deceased after he had been beaten

sitting in the veranda of the accused's mothers house waiting for police

to arrive. None of them witnessed the assault and none was able to

state with certainty who had assaulted the deceased.

39. The only witness who claims to have seen the accused beat the deceased

was **PW8 Anna Muthoni Mwangi**. In her evidence **PW8** says she

was walking home with a friend called '**Njeri**' and her daughter. In her

own words **PW8** states

**“We reached Munandaini we heard something fall we realized it was the accused beating the deceased. We asked the accused to stop beating the deceased. The accused said the deceased was a thief.....”**

40. This evidence of **PW8** is rather vague. How did she 'realize' that the

accused was beating the deceased. **PW8** did not give particulars of

what she saw. How was the accused beating the deceased and with

what? On what part of the body was the deceased struck? All these

critical questions remain unanswered.

41. Moreover **PW8** told the court that she was in the company of one '**Njeri**'

and her daughter. Neither '**Njeri**' nor her daughter were called to testify

in order to corroborate the evidence of **PW8**. The two were crucial

witnesses and the court is not told why the prosecution failed to call them

to testify.

42. This court is very mindful of the fact that the evidence of a single witness

is sufficient - however that evidence must be clear, credible and free

from any inconsistencies. In this case the evidence of **PW8** is not

clear nor succinct and the same is not corroborated.

43. It would appear that the prosecution are seeking to rely on the fact that

the accused was seen within the area of the incident and some of the

witnesses state that they saw the accused holding a big stick which is

presumed to have been the weapon which was used to inflict the fatal

injuries on the Deceased.

44. Firstly the accused was not the only person in that area. As stated

earlier **PW1** told the court that he found the accused at the scene with

his uncle '**Wahome**'. No evidence has been tendered to exclude

this '**Wahome**' as the person who assaulted the deceased.

The mere

fact that the accused was seen at the scene is not proof that he

committed the unlawful act.

45. Secondly the mere fact that the accused was seen carrying a big stick is

not proof of his guilt. A wooden stick was produced in court as an exhibit

**Pexb 5.** There is no evidence to prove that this was the stick used to

assault the deceased.

46. In view of the serious injuries which were sustained by the deceased

any weapon or stick used to inflict those injuries would have been blood

stained. No blood stains were seen on this wooden stick. No forensic

analysis was conducted on the stick. **PW17** who was the investigating

officer stated that

**“I could not confirm that the sticks were the murder weapons.”**

47. Similarly no forensic analysis was conducted on the deceased's

clothes which were produced in court. **Pexb 1 to Pexb 4.**

This is despite the investigating officer having testified that the clothes

which were recovered at the scene were blood-stained.

48. In my view this was a major omission by the prosecution.

There is

nothing to link this wooden stick to the assault on the deceased just as

there is nothing to link the clothes produced in court to the deceased.

49. The investigations done into this case were in my view incomplete.

Several key aspects were left hanging and key witnesses were not called

to testify.

50. I find that there remains a doubt as to whether it was the accused or

somebody else who fatally assaulted the deceased. The benefit of that doubt must go to the Accused. I find that the prosecution have failed to prove beyond reasonable doubt that it was accused who fatally assaulted the deceased.

51. Having failed to prove the **'actus reus'** of the offence of murder against

the accused the court need to venture into an analysis of whether or not

**'mens rea'** has been proved. Accordingly I do acquit the accused of this

charge of Murder. The accused is to be set at liberty forthwith unless

he is otherwise lawfully held.

**Dated in Nyeri this 17<sup>th</sup> day of April 2026.**

.....

**MAUREEN A. ODERO**  
**JUDGE**

ORIGINAL