

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAHURURU

CRIMINAL CASE NO. 5 OF 2020

REPUBLIC.....ODPP

-VERSUS-

DANIEL MURIUKI WAIGANJO.....ACCUSED

JUDGMENT

- 1. Daniel Muriuki Waiganjo**, the Accused, is charged with the offence of **Murder contrary to Section 203 as read with Section 204 of the Penal Code**. The particulars of the offence are that on the 25th February, 2022, at Revere Village, Mutitu Sub-Location, Nyahururu Sub-County within Laikipia County, he murdered Jedidah Wanjiru Wahome (Deceased).
- To prove the case the State availed 11 witnesses. **PW1 Jared Kiarie Kamau** a village elder was called by Michael Waweru who said he had been to the deceased's house and she was not answering the door. He called the Chief who went to the scene with the Assistant Chief, Police Officers and DCI Officers. And when the door was opened he saw blood where the deceased lay.
- Further, he stated that he was with DCI officers when the Accused was found. That he had left a phone stated to

belong to the deceased at an alcoholic place as a collateral for the alcohol he imbibed.

- 4. PW2 Richard Kinyua Wahome** the son of the deceased got a call from Rubere Kinuthia regarding the incident and when he went to his mother's house he found police officers already at the scene. He was allowed to enter the house where he saw his mother's lifeless body with cuts all over the body including the neck and head. The body was taken to the mortuary. Later he witnessed the postmortem that was conducted.
- 5.** On cross - examination he stated that one Isaack Ngigi used to steal the deceased's chicken and he had stolen her phone.
- 6. PW3 Jackline Natir** stated that she worked at a club/bar and in April, 2020 the Accused was at the bar with another person. And, after he drunk alcohol he did not have money to pay hence he left her a Techno Phone to hold as security for the bill of Kshs.500/-. Two weeks later her son Wycliff Wafula inserted his sim card in the phone and started using it, a sim card that was registered on his father Moses Kipkosgey's name who was subsequently arrested. They led the police to arrest the Accused. The police arrested her alongside her husband and son, that is when she learnt that the cellphone belonged to murdered a lady.
- 7.** On cross - examination she said that she used to record debtors of the bar but she did not record the name of the

Accused because he left the phone as security. That he knew the Accused and was made to identify him at an identification parade. That it had been 3 months since he had been at the bar and she used the phone once.

8. PW4 Isaac Kispkosgey Kimisik the husband of PW3 stated that he was at the bar when a customer failed to pay for alcohol but offered a Techno phone as security. However, he did not redeem it. With time his son put a sim card registered on his name in the phone. That one day while on the farm the DCI interrogated him on how he got the phone. They were arrested and taken to the police station and informed that it belonged to a lady who was murdered. And the Accused, a customer was also arrested.

9. On cross - examination he stated that the phone was a Techno by make but he could not see it in court.

10. PW5 Dr. Boniface Miring'u conducted a postmortem on the body of the deceased and opined that the cause of death was exsanguination following deep cut wound to the mandibular and temporal region (right side).

11. PW6 Margaret Wahuu Maina a Government Analyst and Specialist in DNA profiling received samples for analysis namely a green, yellow and red waistline underwear in a khaki envelope marked 'A'; 'B'- blood sample in a bottle of Daniel Muriuki Waiganjo (Accused), 'C' - Blood sample of Jedidah (deceased) and 'D'- a panga with a black plastic handle tied with a cloth on the handle.

- 12.** The panga was moderately stained with blood of human origin. She concluded that the DNA profile generated from the blood stains on the panga matched the DNA profile generated from the blood sample of Daniel Muriuki Waiganjo (Accused) with a probability of a random match in 2.6×10^{-19} .
- 13. PW7 John Ogutu** the son in-law of the deceased stated that he bought for her mother in-law a phone make Techno at Kshs.1550/- and was issued with a receipt that he was at home with his wife when she was called and informed of the mother's demise.
- 14. PW8 PC Kipsamo Joseph** of scene of crime visited the scene and found a timber house which was closed from inside but the window was open. Timber on the walls had been removed. The body of the deceased lay in the bedroom on the floor with injuries on her right leg, left side cheek. There was a coat on the bed and clothes, a panga which was blood stained. He took photographs that he adduced in evidence.
- 15. PW9 No. 64711 Corporal Fernandez Andove** visited the scene in the course of investigations. He suspected that the intruder had removed the timber to gain entry. Although the door was locked from inside, the window was open. The scene of crime personnel entered through the window and opened the door. They found the body naked on the floor and the deceased had a cut on the head. The panga was at the head where she lay and it was stained with blood. On

searching the house, they found a man's underwear inside the sitting room.

16. That the deceased had a Techno cellphone that was missing. They obtained the deceased's cellphone number 0798405597 IMEI No. 354760090952120. On obtaining the cell data, it was established that the phone was being used by PW4 (Isaac Kimsik). PW4 who had used the cellphone for 3 months alleged that the cellphone got lost 3 days prior to them reaching him. He claimed he had been given the cell phone by his wife Jackline after a customer left it as security at the club. His wife gave the description of the person and PW4 said it must be Museveni. They engaged the village elder, PW1, and managed to arrest the Accused.

17. On cross - examination he stated that a panga was recovered which had blood stains. At the time of his arrest the Accused had no injuries but the DNA profile showed that the blood on the panga matched that of the Accused while the deceased's blood was not on the panga.

18. That at the time of arrest they found the Accused nursing injuries being assisted by his mother. He was alive to the complainant against Isaac Ngigi Muiruri who stole the deceased's cellphone and chicken per the complaint lodged by the deceased but he was released and he did not know his whereabouts. However, he argued that the investigations were in respect of the Accused though none of the numbers in the data availed by Safaricom belonged to the Accused.

19. PW10 No. 236630 Inspector John Mutua conducted an identification parade where Jackline identified the Accused.

20. PW11 No. 70110 Corporal Jonathan Limo, a Safaricom Liaison Officer extracted numbers paired to IMEI 354760090952120 in the case of murder. He found that it was paired to two (2) numbers 011279937 and 0716075263 and this was for the period 10th March, 2020 to 23rd March, 2020. On cross - examination, he stated that No. 011279937 had not been registered to anyone while ID No. 13779597 was registered in the name of Isaac Kimisik.

21. Upon being placed on his defence the Accused who made an unsworn statement stated that he woke up on 29th March, 2020 and which on his way to work he encountered three individuals who introduced themselves as “nyumba kumi”. They arrested him and without telling him the reason of his arrest they took him to Kinamba Police Station and placed in custody. After staying for 2 weeks he was made to take part in an identification parade and he stayed for a further period. Thereafter he found himself at the Nyahururu Main Prison.

22. At the close of the defence case, submissions were tendered by the defence which I have taken into consideration.

23. The definition of murder is outlined in **Section 203 of the Penal Code** which provides thus;

Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.

24. The elements of murder as derived from the penal law are;

a) That death occurred.

b) The unlawful act or omission that caused the death was committed by the Accused.

c) The action by the Accused was actuated by malice aforethought.

25. In **Anthony Ndegwa Ngari v Republic [2014] KECA 424 (KLR)** the Court of Appeal stated that elements of murder are;

“(a) the death of the deceased and the cause of that death;

(b) that the accused committed the unlawful act which caused the death of the deceased and

(c) that the Accused had the malice aforethought.”

26. PW1, PW2, testified to have seen the lifeless body of the deceased which lay in her house. Upon being moved to the mortuary, a postmortem conducted confirmed the fact and cause of death.

27. PW5 Dr. Miring’u on performing the autopsy, according to the postmortem report, the deceased had some other injuries for instance a wound that was healing. However, relevant to

the case was a deep cut wound involving right supra - mandibular region and extending to the right temporal region; severed right facial and right temporal arteries. Also noted was atrophied brain tissue. from the examination he concluded that the cause of death was exsanguination following the deep cut wound to the mandibular and temporal regions. These were serious injuries occasioned by the perpetrator which were definitely not accidental.

28. Section 206 of 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 do 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 bodily harm is caused or not, or by a wish that it may not be caused;***
- c) an intent to commit a felony;***

an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.

29. In ***Nzuki v Republic [1993]*** the Court of Appeal stated that;

“Before an act can be murder, it must be aimed at someone and in addition it must be an act committed with one of the following intentions, the test of which is always subjective to the actual accused:

- i. The intention to cause death;***
- ii. The intention to cause grievous bodily harm;***
- iii. Where the accused knows that there is a serious risk that death or grievous bodily harm will ensue from these acts, and commits those acts deliberately and without lawful excuse the intention to expose a potential victim to that risk as the result of those acts.***

It does not matter in such circumstances whether the accused desires those consequences to ensue or not and in none of these cases does it matter that the act and the intention were aimed at a

potential victim other than the one who succumbed.

Without an intention of one of these three types, the mere fact that the accused's conduct is done in the knowledge that grievous harm is likely or highly likely to ensue from his conduct is not by itself enough to convert a homicide into the crime of murder. See the case of Hyam v Director of Public Prosecutions, [1975] AC 55."

30. Apparently, the perpetrator in acting to inflict the injuries upon the person of the deceased must have known the consequences. When the person inflicted the injury that severed arteries, should have known that it may have led to immediate death following blood loss. The individual inflicted injuries sustained knowing that the act could cause grievous harm or death. Therefore, malice aforethought was present.

31. The State argues that the perpetrator was the accused. There was no direct evidence to the fact hence the court has to rely on circumstantial evidence. Circumstances that existed must be inconsistent with the Accused persons guilt. In ***Judith Achieng Ochieng v Republic, Criminal Appeal 128 of 2006***, the Court of Appeal stated that;

"It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy four tests:-

- i. The circumstances from which the inference of guilt is sought to be drawn must be cogently and firmly established;***
- ii. Those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused;***
- iii. The circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else;***
- iv. In other words, in order to justify a finding of guilt, the circumstantial evidence, in its totality, ought to be such that the incriminating facts lead to the unimpeded conclusion of guilt and that there are no co-existent facts that are capable of explanation upon any reasonable hypothesis other than that of the accused's guilt."***

32. In the course of investigations, it turned out that pW7 had purchased for the deceased a cellphone, a Techno and was issued with a receipt (P-Exhibit 6). The receipt was for a Techno 312 valued at Kshs.1,550/-. It bears two (2) IMEI (International Mobile Equipment Identity) numbers. IMEI

35476009095219 and IMEI 35476009092137. The Investigation Officer caused a letter to be written to Safaricom requesting for data in respect of mobile IMEI No. 354760090952120. He sought to know the subscriber details of the IMEI and any other information that would assist them.

33. PW11, Limo did the analysis and found that it was paired with two numbers from 10th March, 2020 to 23rd March, 2020 namely 011279937 and 0716075263. The number 011279937 had not been registered to anyone while the number 0716075263 was registered in the name of PW4 Isaac Kimisik. The officer was not instructed to look for Jedida Wanjiru Wahome or Daniel Muriuki Waiganjo.

34. The investigations per the data log does not divulge ownership by the deceased and/or possession of the phone by the Accused. Similarly, there is no indication that the cellphone was used between 25th February, 2020 to 10th March, 2020 as the information is excluded.

35. That notwithstanding the cellphone that PW7 had which was not adduced in evidence or identified by PW7 was alleged to have been given to PW4 by his wife PW3. Upon arrest PW4 allegedly contacted PW3 who stated that the Accused was with another man when he went to the bar and they drunk alcohol. And, since he did not have money he left her with a Techno phone as security for a bill of Kshs.500/-. She stated that the Accused would disappear prior to going to settle the

bars' debt hence she took security. She was silent on whether her husband PW4 was present at the pub at the time.

36. PW4 claimed to have been present when the cellphone was left as security. He stated that he knew the Accused very well as a customer. He did not identify the cellphone in court as it was not there but stated that it was a Techno cellphone. According to him they were arrested and taken to custody before the Accused was arrested.

37. PW9 Corporal Andove stated that upon reaching PW4 he claimed that the cellphone got lost three (3) days prior to reaching him. But he knew the cellphone. That PW4 gave them direction to his home and they found PW3 that they interrogated. That PW4 on hearing the description given by PW3 of the person claimed the person was Museveni.

38. He caused an identification parade to be conducted where PW3 identified the Accused. It is argued by the defence that the identification parade was of no probative value. Reliance is placed on the case of **Donald Atemi Sipendi v Republic [2019] eKLR** where Mativo J (as he then was) held that;

“in such matters, the importance of the first statement to the police cannot be downplayed if the description of the attackers is not given to the police than the evidential value of the identification from which the attackers were purportedly picked would be substantially diminished....”

39. And, that the identification parade contravened the police force standing orders, as ages, addresses, and physical similarities of participants were not documented. Reliance is also placed on **Order 6(d) of the Police Force Standing Orders** where it provides that;

The accused suspect person will be placed among at least eight persons as far as possible of similar age, height, general appearance and class of life as him/her. Should the accused person/suspected person be suffering from any disfigurement steps should be taken to ensure that it is not more than one accused/suspect person should appear on identification parade.

40. It is admitted that PW10 made obvious errors and/or omissions. It was not indicated whether the members of the parade were as far as possible of similar age, height, general appearance and class of life as the suspect. There is a provision for a signature but there is a name written a writing that could not be distinguished with the other writing at part A, B and C. No explanation was given why he did not sign.

41. The scene was visited by the officers, police and DCI. PW1 who was the first person to arrive at the scene and later entered the house with police officers was silent on any recovery made at the scene. PW2 was silent on any exhibits recovered.

42. PW8 alluded to a blood stained panga that was on the bed as well as a coat and some clothes. PW9 stated that upon checking the room they found a panga which was on the head and it was blood stained. Exhibits were taken to government chemist for analysis on 15th April, 2020. These were an underwear, the Accused person's blood sample, the deceased's blood sample and a panga that was blood stained. Per the findings of the blood sample, the underwear was not stained with blood while the panga that had a black plastic hand tied with a cloth was moderately stained with blood of human origin stated to be of the Accused. This was the panga found at the scene at the outset as proved by photographs adduced in evidence.

43. The Accused explained how he was arrested, made to take part in an identification parade. He claimed he was at the police station then later found himself at Nyahururu Main Prisons. He failed to render any explanation as to why his blood sample DNA profiling was found on the panga that was found at the scene of the incident. It wasn't suggested that PW3 would have had a motive of lying against him.

44. The Investigation Officer stated that he did not have an injury but on examination clarified that he had an injury that was healing at the time of his arrest. It was not denied at all.

45. It is submitted that a workman Isaac Ngigi was accused of stealing, having been alleged to have stolen chicken and a Techno phone from the deceased. However, this does not

explain the presence of the Accused's blood on the panga recovered.

46. It is apparent that circumstances that existed without any explanation unerringly point to the Accused as a person who committed the offence having been placed at the scene.

47. The upshot of the above is that he is guilty and convicted for the offence of murder as charged.

Dated, signed and delivered virtually this 16th day of April, 2026.

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L.N. MUTENDE

JUDGE