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REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL CASE NO. 54 OF 2010

REPUBLIC.....PROSECUTOR

VERSUS

JULIUS MACHARIA MURIUKI.....1ST ACCUSED

B M N.....2ND ACCUSED

JUDGMENT

The accused persons herein, **Julius Macharia Muriuki** [hereinafter referred to as the first accused (A1) and **B M N** hereinafter referred to as the second accused (A2) are charged jointly with the offence of murder contrary to **Section 203** as read together with **Section 204** of the **Penal Code**.

The **particulars** of the offence are that on the 30th day of June, 2010 at Kayole Kona Mbaya Stage, in Nairobi Estate District within Nairobi area Province, jointly murdered Ben Mwangi [hereinafter referred to as Ben or deceased interchangeably].

The state/prosecution called 10 witnesses in support of its case.

Lucy Wairimu Njoroge (PW1), testified that as at 30th June, 2010 she was employed as a barmaid at Wakarugu Bar within Kayole. Ben was her boyfriend. About 10.00 am she was in the company of Mary. While en-route home in the company of Wairimu, Murangeri and Ben they patronized a bar christened Wagikuyu, within Kayole which was about 50 meters away from the residence of PW1.

In the course of their stay Macharia (A1) peeped twice inside the said bar. She knew Macharia as one of the esteemed customers of Wakarugu Bar where she was an employee. She equally knew Macharia as a boyfriend of Mary ((PW2). The two were in a **come-we-stay relationship**. She also knew that Macharia and Mary had “matrimonial” differences which culminated into the two living apart.

Mary (PW2) and Lucy (PW1) left Ben, and Murungeri drinking and retired to bed at PW1's house. Five (5) or so minutes later Ben knocked PW1's door. She promptly opened. Ben asked Lucy (PW1) to accompany him to his residence which was about 100 meters away. Lucy (PW1) agreed. Mary was thus left alone in the house. Lucy carried along the day's collection from Wakarugu Bar, but left Mary with her-cell-phone. It was now about midnight.

When the two lovers were just about to reach Ben's house Macharia (A1) suddenly appeared from behind and held Ben. Immediately she heard Ben screaming. She tried to cross the road to get assistance in the neighbourhood but Mwaura (A2) stopped her on her track. In the process Mwaura stabbed her with a knife five (5) times. Among other things, her intestines came out. She fell down unconscious. When when she regained consciousness she realized she was at Kenyatta National Hospital. Subsequently she learnt from people who came to see her at the said hospital that Ben had

died as a result of stab wounds. She was hospitalized for about 1 month-from 30th June to 1st August 2010. She lost all the money (day's collection) she had carried in her bra. She assumed that Macharia had stolen the money.

In cross examination she testified thus:-

“Macharia came from behind and stabbed Ben. I identified Macharia by his clothes he had worn during the day. I also called Macharia by name. I asked Macharia why he was harming Ben. He did not reply. I did not talk to Mwaura at that stage. I tried to ran the other side of the road but Mwaura grabbed me. He stabbed me. I told the police the names of the people who attacked Ben and myself.....”

She identified Macharia (A1) and Mwaura (A2), in the dock, as the assailants.

Mary Gachoki Muriithi (PW2), was at a bar christened Wakarugu on 30th June, 2010. When the bar closed she left in the company of Murangeri and Wairimu (PW1) for Wagikuyu Bar. While thereat she saw Macharia (A1) peeping in. Macharia was in the company of the estranged boy'friend of PW1. They went to the said bar to wait for Ben who had promised to find them there.

Ben finally came and they continued drinking until about midnight. Finally she left the said bar in the company of PW1. On the way Ben left them for his house. On the way Ben called PW1 on the cell-phone. PW1 told her that Ben wanted to spend the night with her. Ben came for PW1 who left her phone with PW2 since the said phone had an alarm to wake up PW2 to prepare PW1's child and PW2 child for school in the morning.

The following day, after the two children went to school, she tired to contact PW1 through the cell-phone of Ben but the phone rang and went on voice mail. About 7.30 am one customer from Wagikuyu Bar informed her that PW1 was in hospital. The customer had found her unconscious by the road side writhing in pain. Later on Murangeri who had been to Kenyatta National Hospital narrated to PW2 the circumstances under which PW1 and Ben were stabbed. She visited PW1 at Kenyatta National Hospital and learnt first hand the whole story. She knew Mwaura and Macharia – they were friends. She identified Macharia as (A1) and Mwaura (A2) in the dock.

In cross examination she testified thus:-

“I saw Macharia peep through the door. If one is inside Wagikuyu Bar he could see the people outside. I did not see the 2nd accused.”

Dr Zephaniah Kamau (PW3), a police surgeon stationed at Police Surgery within Nairobi Area received **Macharia (A1)** in his surgery from the police. He was requested to assess his age and mental status and examine him for any physical bodily injuries.

As a result of his examination he concluded that he was 23 years of age. He had some physical injuries which he classified as **harm**. Otherwise he was mentally fit and sound to plead to the charge. He completed and signed two P3 forms which he produced as exhibit 1 and 3 respectively.

On the same day he was also brought one **B M (A2)**. He was also requested to assess his age and mental status and also to examine him for any physical bodily injuries.

As a result of his examination, he concluded that he was 18 years of age. He had red-eyes which he

attributed to mob justice administered on him on 11th July, 2010. Otherwise he was mentally fit to plead. He completed and signed the P3 form which he tendered in evidence as exhibit 2.

Wallace Kimemia Karanja alias Murangeri (PW4), is a security officer at Moniques Bar within Kayole. He was selling *muratina* on 30th June, 2010 at about 10.00 am. The said club is a subsidiary of Wakaruku Bar. He closed the said bar about 10.00 pm on 30th June, 2010.

He went to Wakaruku Bar where he found Wairimu (PW1), and Mary Kasyoki (PW2) and Ben. Ben told him to escort PW1 and PW2 to Wagikuyu Pub which stocks *muratina*. Thirty minutes later Ben joined them. Before he left the company of Ben, PW1 and PW2, Macharia (A1) peeped in three times. He could not fathom why Macharia was behaving that way. He had known Macharia two (2) months before that incident. He then left to close Moniques Bar by securing all the windows and doors.

About 7.30 am the following morning, a boy whom he did not know, disclosed to him that Lucy Wairimu (PW1) was injured. The said boy took him to the scene which was by the road side. He found PW1 lying in a pool of blood. She had deep cut wounds on her body. He facilitated the taking of PW1 to Kenyatta National Hospital. Subsequently, he heard that Ben (deceased) died on the night of 1st July 2010 while at the ICU.

Nganga Mwaura (PW6), was the owner of Wakaruku and Moniques Clubs. One of his employees was PW1. She used to be in charge of the day's collection which she handed over the following day. However, on 1st July, 2010 Wairimu (PW1) did not bring the previous day's collection.

On the 1st day of July, 2010 he went to Wakaruku Bar and found the door closed. This was strange since the Club/Bar was normally opened by Wairimu (PW1) at 7.00 am. On inquiry her neighbours told him that Wairimu (PW1) had been stabbed and had been taken to Kenyatta National Hospital.

On 2nd July, 2010 he went to Kenyatta National Hospital to see Wairimu. He found her unconscious. He was informed that one Ben, a customer, had also been stabbed but had succumbed to his injuries. The body was at the mortuary.

Nickson Githinji Gathogo (PW7), supplies meat at Kayole. About 12.30 am, on 30th June, 2010/1st July, 2010 a stranger told him that his brother-in law **Bernard Bari Mwangi** had been injured. He found him lying by the road-side and rushed him to Kenyatta National Hospital. On 2nd July, 2010 he got information from Bernard's brother that he had passed on. He identified the body for purposes of post-mortem.

In cross examination he testified thus:-

“At the scene of the incident there were people. There was electric light at the scene. The light was sufficient to identify the people who gathered there.”

No. 47323 P.C Kyalo Munyao (PW8), attached to Kayole Police Station recalled the events of 7th July, 2010. In the Company of the deceased's relatives he witnessed the post-mortem on the body of the deceased.

Dr. Johansen Oduor (PW9), a pathologist attached to the office of the Chief Government Pathologist performed a post-mortem examination on the body of Bernard Bari Mwangi, on the 7th day of July 2010. The body was identified by Nickson Githinji Gathogo and Paul Maundia Kariuki. In attendance was P.C Kyalo Munyao.

As a result of his examination he formed the opinion that the cause of death was abdominal injuries due to penetrating force trauma. He signed and dated the P3 which he tendered in evidence as exhibit 4.

No. 38026 Cpl Joseph Ochieng (PW10), attached to Kayole CID Office was summoned by S. P. Kirui. He went to Kayole Police Station and found the OCS, Chief Inspector Sam Boy, who was in the company of P. C Munyao. The OCS briefed him and passed over the case file to him for investigations.

He was informed that the accused was at Kayole Police Station cells. He went to Kayole Police Station and found Macharia (A1) in the cells. Macharia told him that he had been arrested while selling charcoal. That he did not know anything about the murder of Ben.

From Kayole, he went to Kenyatta National Hospital where Wairimu (PW1) was hospitalized. He interviewed Wairimu (PW1) who divulged that she was a friend of (PW2) who was estranged girl'friend of Macharia (A1). That they were engaged in a **come-we-stay relationship** but they had separated. Upon separation Wairimu became a girl'friend of Ben (deceased).

That on the 30th day of June 2010 Ben (deceased) in the company of PW1 and PW2 were drinking at Wagikuyu Bar. Subsequently Macharia (A1) and Mwaura (A2) came to the said bar but did not enter inside. That while thereat Macharia (A1) peeped in three times.

That she came to learn that the deceased was murdered over **love triangle** about 100 meters from the house of Wairimu (PW1). In the course of the attack PW1 was also stabbed. He then compiled the court file and then forwarded it to the Director of Public Prosecution (D.PP), who recommended that Macharia (A1) and Mwaura (A2) be charged with the offence of murder.

At the close of the prosecution's case, I placed both accused on their respective defences after carefully analyzing the evidence tendered by the prosecution witnesses after duly complying with the provisions of **Section 306 (2)** of the **Criminal Procedure Code**.

In his sworn statement Macharia (A1) acknowledged that on 30th June, 2010 he went to look for a job at Kagundo Road. He was referred to a foreman who told him to wait for him at Wagikuyu Bar, at Corner Mbaya, within Kayole. On arrival at the said bar, by 8.30 am, he looked for the said foreman in vain. Instead he found his ex-girl'friend (PW1), Lucy Gachoki (PW2), who were in the company of one Murangeri (PW4). **He did not enter the bar**. He only stood at the door and **peeped inside**. He then went home by 7.00 pm.

On 30th June, 2010 between 7.30 am – 800 pm Wachira visited him. Wachira briefed him about theft that had taken place at Kayole the previous night. Wachira and his entourage told him to accompany them to Kayole Police Station to record a statement as the suspects were his (A1) friends. Instead he was placed in custody. No identification parade was ever done.

On 17th July, 2010 the OCS Kayole came to the cell where he was confined and informed him that he was a suspect in another case and hence he could not be released. On the same day, he was taken to Kenyatta National Hospital by Inspector Ochieng, the investigating officer. At 11.00 am he was taken to ward 5 B. A doctor brought Lucy Wairimu (PW1). Before he could talk to Lucy (PW1) another police officer frogmarched him to a Land-rover parked outside.

While inside the Land-rover Inspector Ochieng told him that he was one of the people who stabbed PW1 on the 30th day of June, 2010. That the boy'friend of PW1 was also stabbed and had passed on. Inspector Ochieng further told him that while committing the alleged offence he was in the company of

one Mwaura (A2). By that time Mwaura was also in the cells. He was held **incommunicado** for 4 days. Thereafter he was taken to Dr. Zephaniah Kamau (PW10) who examined him. Subsequently he was arraigned in court for the offence of murder. He denied the charge.

In Cross examination he testified thus:-

“On 30th July, 2010, I was in the company of the 2nd accused at 11.00 pm at Wagikuyu Bar in Kayole. Inside the Club I saw Mary Gachuki, my ex, and Lucy Wairimu. Both were at the counter drinking alcohol specifically muratina. The two Mary and Lucy – were in the company of one Murangeri, a patron of the Club. I knew Bernard Bari Mwangi the deceased. My intention of going to Wagikuyu Bar was to see Mwangi who was trying to get me casual work. I did not get Mwangi, so I left the bar.

I know Lucy (PW1). She also knew me. Lucy was in company of the deceased and Mary. There was no bad blood between Lucy and me. I do not know why Lucy said I stabbed Ben Mwangi. Mary in her evidence said I entered the bar but I did not. I only opened the curtain and looked inside and left.”

In his sworn statement **Boniface Mwaura (A2)**, testified that he was a casual labourer at building sites. That on 30th June, 2010 he went to work as a casual. He left work at 5.00 pm. That day he did not see Lucy or Mary. He was arrested on 12th July, 2010 while at a carpentry shop. That on that day after work he went to buy food at **Komarock** when 3 people approached him. They told him there was a place where he could be employed. He agreed to go with them. When they reached Corner Mbaya these people demanded sh.5000/= which he had borrowed from them a while ago. When he failed to do so, he was handcuffed and was subsequently assaulted. He was taken to Kayole Police Station and booked in cells. He was transferred to Soweto Police Station where he was confined for three (3) days. Subsequently he was taken to Dr. Zephaniah Kamau to assess his mental status and any bodily injury. **His age was assessed at 17 years.** He denied the offence **in toto**.

On the available evidence, presented in court, it is clear to me that Macharia (A1) was previously a boyfriend of Lucy Wairimu (PW1). The two were in a **come-we-stay relationship**. However, before the incident, that forms the substance of the charge, they had separated. Lucy Wairimu (PW1) then entered into another relationship with the deceased herein, Ben Bari Mwangi.

On the 30th day of June, 2010 Macharia (A1) visited Wagikuyu Bar within Kayole. He **peeped** inside the said bar and saw Mary Gachoki (PW2) his former girl'friend who was in the company of Lucy Wairimu (PW1). PW1, and PW2 were in the company of one Wallace Kememia Karanja **alias** Murangeri (PW4). The deceased herein later joined PW1, PW2 and PW4. They were making merry.

About mid-night PW1 and PW2 left the bar and went to their residence. Shortly thereafter the deceased rang PW1 and made known his intention of having PW1 for the night. The deceased actualized his intention by coming for PW1 five or so minutes later. Incidentally the house of PW1 and the deceased were about 100 meters apart.

PW1 and PW2 were sharing a house. Each of them had a school going child. PW1 then arranged with PW2 how the two children would be dropped at school. To enable PW2 to wake up in time for the said children to attend school, PW1 left PW2 with her cell-phone which had an alarm. It was now past mid-night.

When PW1 and the deceased were just about to reach the deceased's residence Macharia (A1)

suddenly appeared from behind and held Ben. The next thing PW1 heard was Ben screaming. In the face of the attack she tried to cross to the other side of the road to seek help from the neighbours but Mwaura (A2) immediately followed and stabbed her five times. She then fell down unconscious. When she gained consciousness she found herself at Kenyatta National Hospital. Later she came to learn that Ben had passed on as a result of the injuries sustained during the attack by the accused persons.

Lucy (PW1) in cross-examination was categorical that she identified Macharia (A1) by the clothes he was wearing the night of the attack. She even called Macharia by name. Further she named the assailants to the police at the first available opportunity. She identified both Macharia (A1) and Mwaura (A2) in the dock as the assailants. She also knew them before the incident.

PW1's version of the events of that night up to the time she reached her residence was supported by the evidence of PW2. PW2 testified that about 7.30 am on 1st July, 2010 a customer from Wangikuyu Bar informed her that PW1 was hospitalized at Kenyatta. She visited PW1 at the said hospital and learnt of the events that led to her hospitalization and the eventual demise of Ben (deceased). She identified Macharia (A1) as the person who peeped inside the Wagikuyu Bar where they were drinking with PW2 and PW4 on the fateful night.

Wallace Kimemia Karana alias Warungeri (PW4) evidence further supported the evidence of PW1 and PW2. In substance he found deceased, PW1 and PW2 at Wakaruku Bar. The deceased asked him to escort PW1 and PW2 to Wangikuyu Bar. Thirty (30) or so minutes later the deceased followed. He saw Macharia (A1) peeping inside Wagikuyu Bar. The behaviour of Macharia perplexed him. He had known Macharia (A1) two months before this incident. Before mid-night he left the company of PW1 and PW2 for his residence.

About 7.30 am on 1st July, 2010, a boy whose name he did not know, confided in him that PW1 was injured the previous night. Later on he came to learn that Ben was injured and was hospitalized at ICU at Kenyatta National Hospital. He visited Ben who by bad luck succumbed to his injuries.

Nickson Githinji (PW7), brother-in-law of the deceased, was informed at 12.30 am on 1st July, 2010 that Ben had been injured. He found Ben lying by the roadside. He rushed him to Kenyatta National Hospital where he was admitted at the ICU. He described the scene thus:-

“At the scene of the incident there were people. There was electric light at the scene. The light was sufficient to identify the people who were gathered there.”

Against that backdrop of evidence, it is clear as day light, that there was electric lamp at the scene. Hence, PW1 was able to identify [Macharia and Mwaura] the assailants positively. In a nutshell visibility was not a problem. On the one hand Lucy (PW1) had earlier on seen Macharia at Wagikuyu Bar, just before the attack, and identified him with the clothes he was wearing just before the incident. Accordingly the identity of Macharia cannot be in doubt. On the other hand the identity of Mwaura is captured in cross-examination of Macharia (A1) thus:-

“On 30th June, 2010, I was in the company of the 2nd accused at 11.00 pm at Wagikuyu Bar in Kayole.”

Accordingly both Macharia and Mwaura, who were known to PW1, PW2 and the Murungeri were identified positively. There was no need to hold **identification parade** because Macharia (A1) and Mwaura (A2) were known to the two eye witnesses – PW1 and PW2. It was an issue of **recognition**. In any event Macharia (A1) admitted that he was in the company of Mwaura (A2) shortly before the attack.

Against that backdrop of evidence, the denial by Mwaura (A2) that he was not at the scene and had no hand in the attack of PW1 and the deceased is a big lie. I discount his defence to that of extent. Accordingly I find as a matter of fact that Mwaura (A2) was at the scene and in deed stabbed PW1 five times.

Although Macharia (A1) denies having stabbed the deceased, on the basis of the evidence of PW1, I find as a matter of fact that he appeared from behind and stabbed the deceased who eventually succumbed to his injuries.

Section 21 of the **Penal Code** provides, thus:-

“When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its connections was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.”

Based on Section 21 aforesaid and the evidence on record both, Macharia (A1) and Mwaura (A2) were acting in concert to prosecute an illegal purpose. In the course of their concerted effort, Ben (deceased) was severely injured and subsequently succumbed to his injuries. **Malice – aforethought**, a necessary ingredient of the offence of murder was thus established.

Johannes Oduor (PW9) who performed the post-mortem concluded that death was due to penetrating force trauma. He signed and dated the P3 which was admitted as exhibit 4. Hence the fact of death **actus-reus** was thus proved beyond any reasonable doubt

Against that backdrop of evidence, I find and hold that both Macharia (A1) and Mwaura (A2), with common intention caused the death of Ben Bari Mwangi the deceased. I accordingly convict **both** of them of the offence of murder. I find, and hold as a matter of law, that both the accused persons are guilty of the offence of murder contrary to **Section 203** as read together with **Section 204** of the **Penal Code**.

I sentence **Macharia (A1)** to suffer death as provided by the appropriate relevant law, having taken into due consideration all the mitigating circumstances as presented to me by learned defence counsel.

As regards Mwaura (A2) there is evidence of Dr. Zephaniah Kamau (PW3) that he was 17 years old at the time of the commission of the offence. Since the law does not allow a minor to be sentenced to death, I accordingly sentence him to be detained at the **President's pleasure** courtesy of **Section 25 (2)** of the **Penal Code**.

Both accused have right of appeal within 14 days.

Dated and **delivered** at **Nairobi** this **19th** day of **March 2015**

N. R. O. OMBIJA

JUDGE



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