



Case Number:	Criminal Case 53 of 2009
Date Delivered:	18 Dec 2009
Case Class:	Criminal
Court:	High Court at Nairobi (Milimani Law Courts)
Case Action:	Judgment
Judge:	
Citation:	REPUBLIC V MICHAEL NDERITU MWANGI
Advocates:	<p>Mr. Awendo for the Accused</p> <p>Mr. Kibaki for the State</p>
Case Summary:	.
Court Division:	-
History Magistrates:	-
County:	-
Docket Number:	-
History Docket Number:	-
Case Outcome:	-
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-
<p>The information contained in the above segment is not part of the judicial opinion delivered by the Court. The metadata has been prepared by Kenya Law as a guide in understanding the subject of the judicial opinion. Kenya Law makes no warranties as to the comprehensiveness or accuracy of the information.</p>	

**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Criminal Case 53 of 2009

REPUBLIC PROSECUTOR

VERSUS

MICHAEL NDERITU MWANGI ACCUSED

JUDGMENT

The accused MICHAEL NDERITU MWANGI is charged with MURDER contrary to section 202 as read with section 204 of the Penal Code. The particulars of the offence are that on 30th May 2009, at Motherland slums, Eastleigh Section II within Nairobi Area, Married ANN NYAMBURA KAMAUDE.

The facts of the prosecutor's case are that the accused and the deceased lived as husband and wife and that they had constant quarrels. On the material day it is the prosecution case that the accused hit the deceased by the neck from behind and stabbed her with a knife on her abdomen before running away with the murder weapon. The murder weapon was never recovered. The prosecution case is that members of the public chased the accused person before the accused person surrendered to the police at Eastleigh Police Post, the same evening.

At the time of surrender he was not having the murder weapon. In addition he had a cut second on the left eye brow.

The accused gave an unsworn defence and in that defence he denied stabbing the deceased at all. The accused person stated that on the material day he had delivered illicit brew to his customers during the day. That he had a fresh order to deliver to some of these customers that evening but that his wife, the deceased, insisted that he was not going to leave home that evening. The accused stated that both he and his wife had drunk a little and that when she held him to stop him from leaving, he slapped her. That on slapping her, his wife

screamed attracting her family members. The accused stated that those who came included the deceased two sisters, one brother and two children of her sister. The accused person stated that the deceased stabbed him on the left eye where he later got 8 stitches. That her siblings started beating him with sticks. That he held the deceased so that she does not stab him again but that as she pulled herself from him, she stabbed herself on the stomach. The accused stated that he slipped and ran away to the police post.

I have carefully considered the evidence adduced by both the prosecution and the defence.

No submissions were made in this case by both counsel, Mr. Kibuka for the State and Mr. Anambro for the accused person.

The burden of proof lies upon the prosecution to prove its case beyond any reasonable doubt. The prosecution case was that the accused person stabbed the deceased in the stomach and that it was as a result of that injury that she died. The defence on the other hand maintains that the injury was self-inflicted by the deceased upon herself and that therefore the accused person is innocent of her death.

The prosecution called nine witnesses. Among these witnesses only one witnessed the incident. This was PW1 DUNCAN WIENDA IRUGU. There were four other witnesses who came to the scene soon after the incident. These were PW1, 2, 3 and 5. The evidence of Duncan was that at 10 pm on the material day, he was seated outside Kamanda's home together with the deceased. They were just chatting when the deceased stood up and walked 10 ft away and entered the house of one Benta. Benta was not called as a witness. Duncan says that he next saw Njumbura the deceased step outside Benta's house. It is then Duncan saw Njumbura the accused hold the deceased by the neck, saw him strangling her, and then he heard the deceased scream. That immediately upon hearing the deceased scream, the accused person released her and started walking towards him. Duncan Duncan says that he noticed that the accused was holding a knife and so on seeing that he started screaming and running away from the accused. Duncan says that the accused person also started running and that he ran towards the door. Duncan says that the alleged running only when he noticed that people that had been attracted by the screams. He says that after the people responded, he went to look for a taxi and found one had been summoned. Duncan testified that he then helped carry the deceased to the vehicle and accompanied her and others to Kenyatta Hospital. Duncan testified that at the time he assisted to put the deceased to the car, he noted an injury on the deceased from her left breast to the abdomen and also on the left arm.

I have considered the evidence of Duncan, PW1, Chari, Duncan did not witness the actual stabbing of the deceased. All he witnessed was a struggle between the accused and the deceased during which the deceased was strangled by the accused person. He next heard a scream from the deceased before seeing the accused running away holding a knife. Duncan explained that there were clothes hanging on a line between him and the post which stopped him from seeing the actual stabbing of the deceased. Duncan was however clear that the accused had a knife in his hand at the time he let go the deceased. Duncan was also convinced that no one else was present at the place where the incident occurred at the time it occurred therefore ruling out a possibility that the injury on the deceased was caused by someone else other than the deceased.

Before looking further into the evidence of PW1, and considering how it relates with the rest of the evidence, it is important to state that PW1 was placed in calls in the course of his testimony when all attempts to persuade him to speak audibly enough were fruitless. I had an opportunity to study this witness as he later testified and to examine his demeanour. I found him to be still suffering from the trauma of the incident he had witnessed 10 ft from where he had been sitting. I noted that the incident took place only on 30th May 2005. At the time Duncan was testifying on 1st October, 2005, it was only four months since the incident. I also considered the relationship between Duncan and the deceased. According to Duncan he could call the deceased his aunt and further more they came from the same village and were great friends. I am persuaded to find that from all these facts and circumstances, PW1 Duncan was still traumatized for reason the incident was still very fresh in his mind and for reason he actually witnessed the accused access the deceased an injury which may have led to her death. I found PW1, Duncan a truthful witness worthy of belief.

I now wish to examine the evidence of the other witnesses. There was PW2 PURITY ALICE KAMANDA, a sister of the deceased. Her evidence was she merely heard screams coming from the direction of her late sister's house. Purity described the distance between her home and accused person and deceased together as 20 meters apart. Purity stated that she went on to find the deceased holding her stomach with intensive pain and accused person walking near to the deceased and towards her. Purity holding a knife. Purity says that her immediate reaction was to place the deceased behind her to shield her from the accused. She then took water which was warming on a stove and threw the water at the accused person. That on so doing the accused person started running towards her and that to avoid him she ran all the way to Eastleigh Police Post, while at the same time screaming for help. Purity testified that later when she went back home she found a pool of blood at the door where she left the deceased.

The other evidence was that of PW3 ALICE WITHEKA KARANDE, another sister of the deceased. Alice testified that she too did not witness the stabbing of the deceased. Alice testified that she was in her house with her friends, preparing food for her young child. She stated that she heard someone scream. Then she heard her sister's name and her, that is Ngali (PW1) and Wathera (PW2), being called. Alice confirmed from her friends that they too heard her name being called out before going out to check. Alice testified that when she went out of the house, she met with the accused person holding a knife above his head as if ready to strike. Alice claimed that the accused person threatened her with the knife and that consequently she started running and that she ran towards the shops. Alice stated that she later saw a group of people chasing the accused person and that she joined the group. She later went home to find an impromptu fundraising going on to raise funds for her sister Purity, to go to Kenyatta hospital to check on the deceased.

The other witness was PWS STEPHEN KAMAU NDROGE. His testimony was that he was relaxing inside Purity Njeri's house. Stephen testified that Purity was a sister of his girlfriend Walthers (PWG). Stephen testified that he heard screams outside and that he went out of the house to find the deceased holding her intestines and calling out the name Njeri. That he also saw the accused person behind the deceased holding a knife, full of blood stains. Stephen stated that on seeing him, the accused person ran away from the scene. Stephen said he knew both the accused person and the deceased before the incident. Stephen stated that he helped chase the accused person and that to escape, the accused person ran and surrendered to the Police at Eastleigh Police Post.

The other witness was PWS JANE WAMBUI KHADE. Her evidence was that she was visiting Mama Joyce and was at the home of Mama Joyce with her and her daughters that evening. Jane testified that at about 8 pm she heard the deceased screaming and calling out the names Walthers and Njeri. Jane testified that the house of the deceased was 5 meters from the house where she was. Upon going out of the house Jane testified that she saw the deceased lying on the door at the entrance to her house. Jane stated that the deceased was bleeding and that her immediate reaction was to look for a vehicle with the help of her friend's daughters, to take the deceased to hospital.

These were the persons around the scene at the time the incident took place. I wish to examine the evidence of PW1 to 5 in regard to consistency, discrepancies contradictions or otherwise of the evidence.

I have considered that the incident took place at around 8 pm, a time when the sun had already set. It was therefore at night. In regard to the lighting conditions at the scene at the time of this incident, Purity, PW1, described security lights at the scene as being big and bright and situated near the deceased and accused person's house, about 30 meters from her own house. Alice PW3 on the other hand described the lights as being 30 meters from her house where she was when she heard the screams. According to Alice there was a big security light which was lighting the area facing down road which enabled her to see both the accused person and the deceased.

PW3 said he saw the accused person clearly due to an electric light which was outside the houses. PW3 did not describe any lights.

Regarding identification I find that each of the witnesses PW1, 2, 3 and 4 (Purity, Alice, Stephen and Duncan) had a fair chance of seeing the accused person at the scene soon after the incident. For Duncan he saw the deceased struggle the deceased, and then he heard the deceased scream before the accused released her and walked away from her towards him holding a knife. He ran away when the accused person walked towards him menacingly. Duncan said he knew the accused person before for a period of one month when he, Duncan, lived at the plot. He, therefore, knew the accused person very well. The evidence of identification is therefore that of recognition by Duncan, Purity, Alice and Stephen who all saw the accused person holding a knife soon after the deceased was injured. Purity and Alice were sisters of the deceased and both knew the accused person very well. There could not have been any mistake in the identity of the person seen carrying a blood stained knife soon after the incident.

also knew the accused person before. I have no doubt that the **Stephen** accused person was the person seen by **Duncan, Purity, Alice,** and **Stephen** carrying a knife soon after the deceased was stabbed in her chest and abdomen. In fact the evidence of **Purity** and **Stephen** was that the accused was walking next to the deceased as she walked towards **Kamande's** home(home of **Purity, Alice** and other family members) holding her protruding intestines. That in effect means that at the time the accused held the deceased by the neck as witnessed by Duncan, she had no injury; but by the time he released her, the deceased had such a severe injury that her intestines could be seen protruding from her stomach.

The accused on his part stated that the deceased caused her own injury in that she stabbed herself as she struggled with him in the presence of two of her sisters, one brother and two of her sister's children. I have considered his defense and analyzed it against the rest of the evidence. I must state that the defence did not suggest to any witness including the deceased own sisters who testified and whom the accused alleged were present when the deceased stabbed herself. However the court for the accused, Mr. Aranda, put a direct question to the Doctor who produced the post mortem form on the Deceased. Dr. Njau Mwangi produced the post mortem form filed by Dr. Ngari who performed the PM. In answer to the question whether the injury could have been self inflicted the Doctor ruled that out on the grounds that the injury to the lung and the abdomen was so deep as to be impossible for a person to inflict on themselves. The Doctor's own words were

"The incision or stab wound on the lung injury is impossible to have been self inflicted."

The depth of the incision from the abdomen to the lung demonstrates that one could not have thrust an object that deep to reach the lungs on their own. It is not self inflicted."

I do find that the doctor's evidence ruled out any possibility that the deceased inflicted the injury on herself. The other significant piece of evidence from the doctor is that the injury which caused the deceased death was consistent with a stab wound with a sharp object. That is consistent with the evidence adduced by the prosecution that the deceased was stabbed in her abdomen and breast area just before her death. The cause of death is therefore clear that it was a stab on her abdomen which eventually led to her death.

The question is whether the evidence of the prosecution sufficiently establishes a nexus between the injury inflicted on the deceased and the accused as the one who inflicted it. Since the key witness did not see the accused actually stab the deceased, the evidence against the accused can be regarded to be circumstantial evidence. I will consider a few leading cases with regard to the principle of circumstantial evidence.

In the case of **R –vs- TAYLOR, WEAVER AND DONOVAN** (2) the principle as regards the application of circumstantial evidence was enunciated in these words:

"Circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensified examination, is capable of proving a proposition with the accuracy of mathematics. It is no derogation of evidence to say that it is circumstantial."

In the case of **R –vs- FORTSON** (1970) 142 R 756, the Court of Appeal held as follows:

"The court can only act on circumstantial evidence to support the conviction of an accused person if the evidence points irresistibly at the accused's guilt to the exclusion of everybody else."

Before drawing the inference of accused's guilt from circumstantial evidence, the court must be sure that there are no other co-existing circumstances which would weaken or destroy the inference of guilt of the accused."

The Court of Appeal in **KARIBU KARANJILI VS RFD 139(1) KLR 116** held as follows regarding circumstantial evidence:

"In order for circumstantial evidence to sustain a conviction, it must point irresistibly to the accused and in order to justify the inference of guilt on such evidence, the incriminatory facts must be incompatible with innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt. The burden of proving facts justifying the drawing of that inference is on the prosecution."

This statement is in line with the holding on the same point in the celebrated case of ISA VS SINDIGA, JAMAT KOSORU, LUGORU & KAKU LTD.

I am guided by the ratio decidendi in these cases. I have carefully considered the evidence by the prosecution witnesses and also by the accused in his defence. I find that the accused was seen by **Duncan** holding the deceased by her neck. **Duncan** had been with the deceased just before the attack and his evidence was that she was whole when she left him shortly before the attack. By the time the accused released the deceased, she had screamed and soon thereafter she was seen by **Purity** and **Stephen** holding onto her protruding intestines. I find in the circumstances of the facts of this case, no other inference can be drawn from these facts except that of the accused is the one who stabbed the deceased on her abdomen on the fateful evening. I therefore find the accused defence that the deceased inflicted the injury on herself untenable. Regarding the accused defence, the accused alleged that his siblings in law fought him and that the deceased stabbed him in the eye. The evidence of eye witnesses is that the accused had no injury by the time he left the scene of the incident. The eye witnesses testified that the accused was chased by people who were looking for his blood. He was under close watch when he gave himself up to **PC Mwangi**. Even the **CCCP UNIT 99** **Muramba** found the multitude of people still after the accused and he had to persuade them to leave. I find that the injury on the accused must have been inflicted after but not in the course of the attack on the deceased. Consequently I dismiss the accused defence that the deceased attacked him and also that the deceased self-inflicted the injury upon herself.

I have examined the entire evidence in regard to the evidence as to whether there were contradictions, inconsistencies or variations or otherwise in the prosecution case. **Duncan** was definitely at the scene when the event started unfolding. His evidence was he saw accused person strangled deceased, she screamed and by the time the accused person released her, he had a knife in his hand. He ran away for his safety. **Purity** came out of her home to find the deceased holding to her abdomen with intestines hanging and the accused person with a blood stained knife behind her. **Purity** stated that she pulled the deceased behind her to shield her before throwing warm water at the accused person and before running for his life.

stated that upon going out to check on the screams she met with the **Alice** accused person with a knife lifted in one hand as if ready to strike. She ran for her life because according to her, the accused person threatened to stab her.

on his part met deceased walking in front of the accused person, **Stephen** holding her stomach with intestines hanging. The accused person was holding a blood stained knife. **Stephen** stated that the accused person ran away on seeing him. **Jane** on the other hand found the deceased lying on the door to her house bleeding profusely.

From the evidence of these the witnesses, I find that there is no contradiction in their testimonies. I find the differences in their evidence were variations which could easily be explained. It stems from out of the fact that what each witness saw of the incident was at a different stage of the event and from a different time and distance. I find that there was no inconsistency or contradiction in their evidence. I find that **Duncan** witnessed the beginning part of the incident and his immediate reaction was to run away. The accused by the name **Purity** and this is because the deceased was still walking towards the **Kamwinda's** home when she saw her and the accused person. She too ran away. Next in the scene was **Alice** who also ran away from the accused person's uplifted knife wielding hand. By then **Alice** saw the deceased walking towards the **Kamwinda's** home. **Stephen** came next after **Alice** and is after he came to the scene that the accused ran away and was later pursued up to the Police Station. I also do think that there was a measure of anxiety and maybe confusion given the fact that the first people at the scene opted to run away rather than take any step to rescue or go to the deceased help. This is not surprising if one considered that **Duncan, Alice** and **Purity** were all young people in their early twenties and considering the nature of the injury the deceased suffered.

I find that the prosecution has adduced evidence to prove that the accused attacked the deceased with a knife inflicting serious injuries to her abdomen and lungs, and that the said injuries were the direct cause of the deceased death. I must also state here that the accused surrendered himself to the Police soon after the incident. Even though I am not relying on this fact, it is worth noting that when the accused presented himself to **PC Mwangi** **P/SL** at Eastleigh Police base, he informed him that he had killed someone. This statement is consistent with his defence.

The next issue to consider is whether the prosecution has established that the accused had malice aforethought to commit the offence. Section 205 of the Penal Code defines malice aforethought as follows:

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;**
- (d) 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”.**

The evidence by the prosecution shows that the accused attacked the deceased and stabbed her deeply into her abdomen and chest causing severe and deep injury to her lungs and stomach. When the accused sat upon the deceased and stabbed her with a knife in her abdomen, he must have known that the act of stabbing the deceased so deeply in her chest and abdomen could cause death or grievous harm to the deceased. In that regard I am satisfied and do find that malice aforethought was established as defined under S. 205(a) and (b) of the Penal Code.

In view of the foregoing, I am in no doubt that the prosecution has proved its case against the accused person on the required standard, beyond any reasonable doubt. Accordingly I find the accused person guilty of the offence of Murder under section 202 of the Penal Code. I convict him accordingly.

Dated at Nairobi this 14th day of December, 2009.

LEGIT

JUDGE

Read, signed and delivered in the presence of

Etika Court clerk

Accused Present

Mr. Kibuka for the State

Mr. Anomoi for the Accused

LEST

ABGC



While the design, structure and metadata of the Case Search database are licensed by [Kenya Law](#) under a [Creative Commons Attribution-ShareAlike 4.0 International](#), the texts of the judicial opinions contained in it are in the [public domain](#) and are free from any copyright restrictions. Read our [Privacy Policy](#) | [Disclaimer](#)