



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**HIGH COURT CRIMINAL CASE NO. 75 OF 2009**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**JACKSON NAMUNYA TALI.....ACCUSED**

**JUDGEMENT**

The accused herein, **Jackson Namunya Tali**, (hereinafter referred to as the accused and Jackson interchangeably) is charged 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 27<sup>th</sup> day of July, 2009 at Gachie market within Gachie Sub-location, Kihara Location, within Kiambu District of the Central Province murdered Christine Atieno (hereinafter referred to as the Christine and the deceased interchangeably).

The prosecution called eight (8) witnesses in support of the state case.

**Dr. Daniel Kwai Wanjai, PW1**, holds a Bachelor of Medicine and Bachelor of Surgery degree from the University of Nairobi, 2004 and Masters in Medicine from the same University.

On the 27<sup>th</sup> day of July, 2009 he was stationed at Kihara Sub-District Hospital as a Medical officer of Health. While at the Casualty Department, the accused introduced himself as the owner/proprietor of a private clinic in Gachie Shopping Centre. The accused disclosed that he had a patient who was in the back seat of his car parked at the parking bay within the precincts of the hospital. He requested PW1 to attend to the said patient who had developed complications while being treated at his clinic.

When PW1 went to the car to check the patient, he found that she was already dead. He observed that the patient had blood on her thighs and all over her clothes. He opined, in his capacity as a doctor, that the patient had bled to death. He identified the accused as the person who requested him to attend to the deceased who was inside the vehicle.

**Beatrice Kwamboka, PW2**, is a vegetable vendor. She was a tenant in a flat with several rooms.

On the 27<sup>th</sup> of July, 2009 at about 5.30 am she was asleep at her rented room No. 1 within Gachie Shopping Centre. Her next door neighbour (room No. 2) was Grace Owino the wife to PW6. Her (PW2) husband was awakened by noise emanating from the children's room, which was No. 3. There was a girl who had visited the Owino's whom they accommodated and was sleeping together with her children in room No. 3. She went to check the source of the noise from room No. 3. She confirmed that the girl, who was a visitor of the Owino's, was crying. She was complaining of stomach-pain. The girl told her (PW1) that she had consulted a "doctor" who had injured her. She became curious and demanded to know whether she was pregnant. In the meantime she woke up Grace Owino. In the company of Grace Owino and the visiting girl they went to see the "doctor" who had injured the girl. The girl led them to the clinic of the said doctor who happened to be the accused.

By then, the "doctor" had not opened the clinic. She then left the girl and Grace Owino waiting for the clinic to open. Grace Owino later confided in her (PW2) that the girl procured abortion with the assistance of the "doctor", but was so far safe. The foetus had come out. However on the 28<sup>th</sup> day of July, 2009, she heard Grace Owino crying in her room. On enquiry, Grace's husband informed her that the girl who had procured abortion had passed on.

**Albert Moi Njeru, PW3**, was an employee of the accused who was operating a clinic in Gachie Christined M.P MEDICAL CLINIC & LABORATORY. On 27<sup>th</sup> day of July 2009 at about 7.30 am the accused asked him to clean the clinic. In the process of cleaning some policemen came looking for the accused. One of the policemen took photographs of the clinic and ordered him to carry the equipment he was using in cleaning the clinic – jerrycan and mop – to Gachie Police Station. As at that time he had worked for the accused for about two (2) months.

**Dr. Zaphania Kamau, PW4**, hold a Bachelor of Medicine and Bachelor of Surgery degree from the University of Nairobi in the year 1987. He is attached to Nairobi Area Police Surgery in the capacity of a surgeon. His duties include, but are not limited, to filling in P3 forms upon examination of persons who are referred to him by the police.

On the 7<sup>th</sup> day of August, 2009 the police brought to his clinic, one Jackson Namunya Tali from Gigiri Police Station. He was requested to assess his age and mental status and to examine him for any injuries. Upon examination, he confirmed that the accused was 41 years of age, had no physical injuries and was mentally sound to stand his trial. He entered his findings in a P3 form which he signed and dated. He produced the P3 form as exhibit No. 1.

**No. 31951 PC Adan Ganya, PW5**, attached to Kayole Police Station was stationed at Kihara Police Post, under Gigiri Police Station. On the 27<sup>th</sup> July, 2009 at about 5.45, pm he was on duty when the accused informed him that he had been referred by Kihara Health Centre to report an incident of death of a patient brought to his clinic while bleeding. That the patient had passed on inside a vehicle registration No. KNU 270, Toyota Corolla, white in colour, belonging to the accused. Out of curiosity he peeped inside the said vehicle and saw a body rapped in a canvas. Blood was oozing from lower part of the body. He communicated this piece of information to the OCS Gigiri who came and took over the investigation.

Last but not least, he testified that the accused divulged to him that his clinic was on River Road within Gachie. That the patient died on arrival at Kihara Health Centre. That the accused came with a note from the said Health Centre to the effect that he (accused) should be investigated by the police.

**Stephen Owino Sije, PW6**, was working for Central Patrol Guard but stationed at Gachie

River Road as at the 27<sup>th</sup> July, 2009. He confirmed that the deceased was the child of his sister – in – law. Her name was Christine Atieno.

On the 20<sup>th</sup> day of July, 2009 at about 10.45 am - he was guarding a premises at Nyari Estate. He received a call from his wife by the name **Grace Achieng Owino**. Grace confided in him that, Christine Atieno who had come to visit them, was not feeling well. For that reason Christine did not go to work.

When he returned the following day - 27<sup>th</sup> July 2009 at 6.30 am - he found the door to his house locked. A neighbour, known by the name Mama Atieno, informed him that his wife had taken the deceased to consult a doctor at a private clinic at Gachie. With the assistance of the said neighbour, he traced the said private clinic by 7.00 am. He was in fact familiar with the accused who was well known in Gachie as an ENT specialist. At that juncture, he heard someone screaming from inside the said clinic. He recognized the voice as that of the deceased. Accused assured him that all was well. If there was a problem he would refer her to another hospital. About 12.30 pm he went to his house to catch some sleep, since he had been on night-shift the previous night. At 3.00 pm he went back to the clinic to check the condition of Christine. The accused said Christine was on a drip. About 6.30 pm he went to work at Nyari Estate. While there he received a phone call from his wife to the effect that the deceased was not in the the clinic. About 6.30 pm he called the accused but his phone was off. He talked to the wife of the accused who told him that accused had left with Christine (deceased) in a car to another hospital. That unfortunately Christine passed on.

**Dr. Johansen Odiwour, PW7**, a pathologist attached to the office of the Chief Government Pathologist, holds a Bachelor of Medicine and Bachelor of Surgery Degree from the University of Nairobi in the year 2000. Subsequently, he pursued Masters Degree in Pathology from the University of Nairobi in the year 2008 and Diploma in Forensic Medicine in South Africa in the year 2009.

He recalled performing post-mortem on the body of the deceased on the 4<sup>th</sup> day of August 2009. The body was identified by Grace Adhimbo Owino and Stephen Owino Sije (PW6). The deceased was suspected to have procured abortion at a private clinic with the aid of the owner of the clinic – accused. As a result of his examination he claimed that he was **unable** to establish the actual cause of death. He signed the post-mortem report which he produced in evidence as exhibit No. 2.

**No. 230352 Chief Inspector, Duncan Mulitani, PW8**, the Deputy OCS at Gigiri Police Station recalled that on the 27<sup>th</sup> day of July, 2009 at about 5 pm, he received a call from Sgt. Marara of Kihara Police Post to the effect that a vehicle carrying/ferrying the corpse of a young woman had arrived at the Police Post. He went to examine the body in the company of Constable Ayub Lwamba and Constable Joseph Ndungu. The vehicle in issue was registration No. KUN 270, Toyota Corolla, white in colour. The body was rapped in a white canvas and the lower part of the body was soaked in fresh blood. The accused who had accompanied the body, was already in custody. He organized for the scenes of crime personnel to take photographs. Thereafter, he accompanied the accused and the scenes of crime personnel to the M.P Clinic and Laboratory Services within Gachie Shopping Centre.

He found Albert Moi Njeru (PW3) mopping the floor and thought that he was concealing evidence and accordingly arrested him. He instructed scenes of crime personnel to take photographs inside the clinic. There were certain instruments soaked in fresh blood which he ordered to be taken to the police station. He identified various items and/or instruments, recovered from the said clinic which, he produced in evidence in the manner following:-

- i. Sterilizing kit Exhibit 3;

- ii. a pair of black trouser as Exhibit 4;
- iii. Orange pant as Exhibit 5;
- iv. One black biker as Exhibit 6;
- v. A pair of sandals as Exhibit 7;
- vi. A black and white jacket as Exhibit 8;
- vii. Pink and green stripped sweater as Exhibit No. 9;
- viii. A small green basket containing the deceased clothing as Exhibit No 10;
- ix. A mop and bucket as Exhibit No. 11 (a) and 11 (b) respectively.

From his investigation he came to learn that the deceased was in the process of procuring abortion with the active assistance of the accused at M.P Medical Clinic and Laboratory Services. In the premises, he found sufficient evidence to charge the accused with the offence of murder.

At the end of the prosecution's case, having carefully analyzed the evidence, I come to the conclusion that a *prima-facie* case had been made out by the prosecution thereby warranting the court to put the accused on his defence. I then put the accused on his defence after duly complying with the provision of **Section 306 (2)** of the **Criminal Procedure Code**.

In his sworn statement the accused acknowledged that he was operating a medical clinic, under the name and style of **M.P MEDICAL CLINIC & LABORATORY SERVICES**, at Gachie Trading Centre. In this regard he had a certificate of Kenya Enrolled Community Health Nursing. He produced the said certificate, from **PECEA TUMUTUMU HOSPITAL**, as exhibit D1. He equally produced his certificate from the Nursing Counsel of Kenya as exhibit D2.

He acknowledged that the deceased visited his clinic and gave him a history of her illness – dizziness and general body weakness. Besides that she had backache and severe abdominal pain accompanied by vaginal bleeding. That she had been in that condition for eight (8) days. That prior to that she had had irregular monthly periods. As he was listening to the patient, he recorded the history on the patient's register card which he, however, did not produce in evidence. He explained that he left the same in his clinic on the day he was arrested. However, he did not make any attempt to retrieve and produce it in evidence.

His examination of the patient disclosed that her eyes were pale, an indication of lose of blood. On examination of the abdomen he established that the **uterus was bulky with a uterus mass**. He undertook pregnancy test which proved positive. He then concluded that she was bleeding in pregnancy. He thought of undertaking examination of the pelvic through ultra sound scan, which is normally done by a radiologist. Before he could refer her to a radiologist, he injected her with vitamin B complex to boost her appetite, restore energy and restore the normal functions of the body cells. He also gave her two (2) brufen tablets to take care of the pain. Having done all that he referred her to Kihara Sub – District Hospital for treatment because her condition was beyond his capacity to handle. He did not however, say whether she went to the said hospital.

That on the 27<sup>th</sup> day of July, 2009 at about 6.30 am the patient was brought back to his clinic accompanied by a lady who introduced herself as an aunt. The patient was still bleeding. He again referred the patient to Kihara Sub - District Hospital. The said lady then went away promising to come with a vehicle to ferry her (deceased) to the said hospital.

At about 11.00 am, on the same day, the patient's aunt came back in the company of a man whom she introduced as her husband. The said aunt changed the patient's clothes but she did not come with a vehicle as promised. Subsequently no vehicle came to collect the patient. By 1.00 pm the

condition of the deceased was deteriorating very fast. He then instructed his driver, Duncan Muiruri, to assist him in taking the patient to Kihara Sub-District Hospital.

Unfortunately, the deceased passed on before she could be admitted. The hospital personnel gave him a letter addressed to Kihara Police Post to facilitate the reception of the body at the mortuary. When he reported the incident he was arrested. The police suspected that he had a hand in the death of the deceased. He was taken in custody and in the meantime the police recorded his statement. Subsequently, he was taken back to his clinic where Albert Moi [PW3] was arrested while mopping the floor. Scenes of crime personnel then took along with them *inter-alia* a sterilizer machine, surgical implements, a cheetal forceps, two elevators for dislodging teeth of patients, a mollar forceps for uprooting the teeth, assorted medicine, dustbin, a mop and a duster. He was thereafter taken to Gigiri Police Station and charged with the offence of murder. He denied the charge.

On the available evidence, it is clear to me that the deceased visited her aunt Grace Achieng Owino at Gachie Shopping Centre in or about July, 2009. Apparently she was in the early stages of pregnancy. In the course of her visit, she decided to visit **M.P MEDICAL CLINIC & LABORATORY SERVICES** owned by the accused. Among her major complaints was irregular periods. On examination the accused established that her **uterus was bulky with uterus mass**. The accused undertook pregnancy test which turned out to be positive. At that stage the accused, at the prompting of the deceased, assisted her to procure abortion. In the process, the patient over-bled or had excessive bleeding culminating into anemia and eventual death. The accused tried to reverse the condition by giving her a cocktail of medicine oral and injectables all in vain. The deceased passed on, while being transferred from accused's clinic to Kihara Sub District Hospital inside a vehicle, registration No. KUN 270, Toyota Corolla, belonging to the accused.

Accused reported the matter to the police who then commenced investigations. In the process the accused and his employee (PW3) were arrested. Certain items marked as exhibits 1 – 8 were then taken, by the police from the said clinic, to be used as exhibits in this case.

Direct evidence of the prosecution witnesses, as to the circumstances under which the deceased met her death, is consistent and cogent. In substance the evidence of the prosecution witnesses may be summarized thus:-

1. that the deceased person visited the Owino's;
2. that in the course of the visit the deceased, who was apparently pregnant; visited the clinic of the accused with the express intention of having her pregnancy terminated;
3. that the accused assisted the deceased to procure abortion which led to excessive bleeding; thereby necessitating several attempts to salvage the deceased;
4. the excess bleeding led to anemia which culminated into the patient's death;
5. that in the premises, **malice-aforethought**, an essential ingredient of the offence of murder under **Section 206** of the **Penal Code** was thus established against the accused .

The accused person in his defence does not deny the fact that he attended the patient at his clinic and offered some form of treatment. His only defence is that the deceased had been treated elsewhere, eight (8) days, before she visited his clinic for consultation. In which case the accused defence, as I understand him, is that he was not responsible for the injury which led to the excessive bleeding which in turn led to anemia and eventual death.

The main evidence against the accused consists in part of direct evidence and in part of circumstantial evidence. However, the sum total of the said evidence tell substantially the same story.

The accused in his defence gave sworn statement . He acknowledged that the deceased went to his clinic while bleeding in pregnancy. That he administered some form of treatment to the patient. But he tried to minimize his own role in the affair and to shift the major blame on others that - the deceased had been treated elsewhere before she came for consultation in his clinic.

In this regard, although Dr. Johansen Odiwuor (PW7), in his evidence concluded that he was **unable** to establish the cause of death, there may be **exceptional** cases where medical evidence is lacking but where there is direct and/or circumstantial evidence of what could have caused immediate death. ***This is one such case.*** In this regard, I call in aid the authority of **WAIHI & ANOTHER -VS- UGANDA [1968] E.A** page 278.

Going by the sum total of the evidence on record, both direct and circumstantial, it is clear to me that the deceased was pregnant. That something and/or somebody interfered with the foetus leading to excessive bleeding and anemia.

Against that backdrop of evidence, as to who interfered with the foetus that led to excessive bleeding and eventual death was a fact within the accused's knowledge. Only he would explain how the deceased who visited his clinic when she was well – not bleeding – happened to develop excessive bleeding culminating into anemia and eventual death.

The accused sworn statement by way of his defence, does not appear to me to discharge that burden put squarely on him courtesy of **Section 111 (1)** of the **Evidence Act [Cap 80]** Laws of Kenya, of proving circumstances that would exonerate him from blame.

In doing so, I have not lost sight of the provisions of **Section 111 (2)** of the **Evidence Act [Cap 80]** Laws of Kenya, which in effect provide that **Section 111 (1)** does not diminish the obligation of the prosecution to establish by evidence the commission of the offence charged.

It is with this in mind that I reiterate that the evidence against the accused is partly direct and partly circumstantial. So for as the circumstantial aspect of it is concerned, the inculpatory facts are inconsistent with the innocence of the accused and incapable of explanation on any other hypothesis other than that of guilt. In this regard I call in aid the authority of **SAWE -VS- REPUBLIC [2003] KLR** Page 264.

In the premises, I accordingly find and hold, as a matter of law, that the accused person herein, with **malice aforethought**, caused the death of the deceased while in the process of assisting her to procure abortion. I convict him accordingly of the offence charged.

Having taken into due consideration all the mitigating circumstances, as presented to me by learned counsel for the accused, I sentence the accused to suffer death as prescribed by the appropriate law.

The accused has a right of appeal within 14 days from the date hereof.

**Dated and delivered at Nairobi this 25th day of September 2014.**

**N. R. O. OMBIJA**

## JUDGE



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