



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

(CORAM: CHERERE-J)

CRIMINAL CASE NO. 63 OF 2018

BETWEEN

REPUBLIC PROSECUTOR

AND

DUNCAN KIUNGA..... ACCUSED

JUDGMENT

1. **DUNCAN KIUNGA (Accused)** was jointly charged with 3 others already acquitted for the offence of Murder Contrary to Section 203 as read with Section 204 of the Penal Code.

The particulars of the charge are that on the night of 23rd June, 2018 at Mitunguu [particulars withheld] village, Kirindine location, Imenti South sub-county within Meru County murdered RM

2. Accused person denied committing the offence and the prosecution called a total of nine (9) witnesses in support of their case.

3. **PW3 WM**, husband to RM (R) stated that he was a pastor. He recalled leaving home for a Christian crusade on 23rd June, 2018 and while away the following morning received information from one Pastor Mwaniki that R had been murdered. **PW4 GO PW5 SM** and **PW6 FAM** who are children of PW1 and Roselyne stated that their mother went to run errands on 23rd June, 2018 and did not return home in the evening only to be found dead the following morning, **PW9 IP Tom Onyancha** upon receiving information concerning the murder visited the scene and removed the deceased's body to the mortuary. He subsequently arrested 4 suspects among them Accused herein and also collected, blood samples from each of them, finger nails and vaginal swab from deceased who appeared to have been sexually assaulted and several clothes which he sent to the Government Chemists for analysis. Upon analysis of the exhibits, **PW1 Dennis Mutuma**, the government analyst by his report dated 19th November, 2018 **PEXH. 2** found that Duncan Kiunga's DNA matched the DNA collected from the vaginal swab of the deceased.

4. In his defence, Accused conceded that he met deceased who was his lover on 23rd June, 2018, and was engaging in sex in the bush when a man armed with a metal bar appeared and he ran away and he later learnt that she had been killed. He stated that he identified the man with the metal bar as PM, deceased's husband.

5. I have considered the evidence on record and the issue for determination is whether the prosecution proved its case to the required threshold.

6. The postmortem form **PEXH.1** confirms the death of **Roselyne** as having been caused by severe head injury secondary to blunt trauma with intracranial hemorrhage.

7. It is trite that the burden to prove all ingredients of the offence of murder falls upon the prosecution in all instances save for a few statutory offences. The standard of proof is one of beyond reasonable doubt. This threshold has however been stated not to mean proof beyond any shadow of doubt. The standard is discharged when the evidence against the accused is so strong that only a little doubt is left in his favour. (**Miller Vs Minister of Pensions [1947] ALL. E.R 372.**) In discharging the burden cast upon it by law, the prosecution is required to adduce strong evidence to place the accused at the scene of crime as the assailant since he does not have the burden to prove his innocence or to justify his alibi.

8. Although Accused denies the murder, the conceded having been with the deceased on the date she was murdered. That Accused had sexual contact with deceased is confirmed by the government analysts report PEXH. 2. Accused's defence is that he ran away from the scene in the bush where he was having sex with the deceased after her husband appeared armed with a metal bar and he suspected that she

was killed by her husband.

9. It is a fact that Accused did not put forward his defence implicating PW1 at an early stage in the case so that it could be tested by those responsible for investigating and thereby prevent any suggestion that the defence was an afterthought.

10. From the totality of the evidence, I find that the prosecution has adduced strong evidence to place the Accused at the scene of crime, so strong that an inference can safely be made that he was the one that killed the deceased.

11. The offence of murder is complete when, "malice aforethought" is established if, pursuant to **section 206** of the **Penal Code** evidence proves 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.”

12. It is trite that there is no requirement in the Penal Code that one must have motive for murder which is the unlawful killing of another with malice aforethought under **Section 203** of the Penal Code. That the injuries inflicted on the deceased were so severe and concentrated on the head can only mean that they were intended to cause her grievous harm if not death and Accused ought to have known that such serious injuries could probably cause the death of or grievous harm to the deceased. I am therefore satisfied that malice aforethought has been established in terms of Section 206 (a) and (b) of the Penal Code.

13. Consequently, I have come to the conclusion that the state has proven its case beyond reasonable doubt. Accused is found **GUILTY** of the offence of murder and he is accordingly convicted.

DATED THIS 31st DAY OF MARCH 2022

WAMAE. T. W. CHERERE

JUDGE

Appearances

Court Assistant - Kinoti

Accused - Present

For the Accused persons - Mr. ThangichiaAdvocate

For the State - Ms. Mwaniki