



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT CHUKA

HCCR NO. 9 OF 2018

REPUBLIC.....PROSECUTOR

VERSUS

JAMES MUTEMI Muingo.....ACCUSED

J U D G E M E N T

1. **JAMES MUTEMI Muingo**, the accused herein is charged with the offence of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**. The particulars are that on 1st May 2018, at Magutuni Township, Mwimbi Location within Tharaka Nithi County the accused herein murdered one Miriam Kathomi Kinyua (the deceased herein).

2. The accused person denied committing the offence and the prosecution present a total of nine witnesses. The prosecution's case mainly hinges on circumstantial evidence as seen from the evidence adduced during the trial.

3. Eslie Nkati Nkirote (PW1) told this court that she was a neighbour to the accused and the deceased person who cohabited as man and wife. She added that on the 1st May 2018 (the material date), she was asleep in her house when at around 9 pm, she heard the deceased screaming in her house which was opposite and in the same plot with the house PW1 occupied. She added that she woke up and woke up her other neighbours namely Rose; Kananu (PW3), Nussy Kathomi (PW2), Polycena Kambura (PW5) and one Anne. She further told this court that she went with the others and knocked at deceased's house to find out what was happening but that the accused refused to open the door at first but following their persistence, she stated that the accused partially opened the door stating that he was naked and so he could not fully open the door. She told this court that she asked the accused where the deceased was and he reportedly told them that she was sleeping and that because she was no longer screaming, they decided to go back to their respective rooms to sleep. The witness recalled that when she came out of her house after the screams, she heard the deceased making noises as though she was choking or being choked and that after they went back to sleep there were no further noises or screams.

4. The witness also told this court that the following day (2nd May, 2018) at around 7.30 am she was outside her house and when the accused came out of his house, she asked him where the deceased was, he reportedly answered that the deceased had allegedly gone for a call of nature the previous night and never came back. She further stated that after a shortwhile the accused entered his house and came out with a bag saying that he was taking deceased's clothes to her grandmother. She added that the accused went and did not go back to where he was staying with the deceased. The witness further stated that on (4th May, 2018) at around 6 pm, Nussy Gathomi (PW2) went and told her that a body had been found partially buried in the Landlord's plot next or adjacent to where they lived. She further stated that she suspected the body belonged to the deceased since they had not seen her since the material date of the incident. She added that the deceased and accused had persistent quarrels which often led to fights because the accused person used to drink alcohol.

5. Nussy Gathomi (PW2) testified and told this court that she worked at Kiera Hills Ltd with the accused and that she also lived in the same plot with the accused and deceased. She recalled that on the material date at around 9 pm, PW1 woke her up telling her that the accused and the deceased were fighting. She told this court that she quietly woke up and went to the door of the accused's room and knocked at the door after hearing some noises of someone being choked. She told this court that she knocked the door and as she called the deceased and that the accused responded by slightly opening the door and told them that the deceased (Miriam) had slept and that made her to go and sleep. The following day PW2 told this court that she neither saw the deceased nor the accused at their place of work and that on 4th May 2018, she was alerted by the Landlord (Gilbert Gitonga M'Rama- PW6) about a body partially buried next to where they had rented rooms to stay. She testified that she went and saw a body which had partly been eaten by dogs.

6. Rose Kinanu Mugambi (PW3) on her part told this court that she was also a neighbour to the accused and deceased and that on the material date at around 9 pm she heard (PW1) waking up people in the plot telling them that the accused and deceased were fighting. She added that when she woke up and got outside she heard strange noise of someone being choked emanating from the house occupied by both the deceased and the accused and that the noise was getting faint. She told this court that in the company of the other neighbours they went and knocked at the door and persisted in knocking until the accused partially opened the door and told them that he was naked. She added

that when she inquired about the deceased the accused answered that she was asleep and she went back to her house and slept.

7. The witness added that the accused and the deceased had on previously occasions fought and that they had one time in fact notified the Landlord and the police about it.

8. Polycena Kawira (PW5), told this court that she also worked and stayed together in the same plot with the accused. She reiterated the evidence tendered by PW1, PW2 and PW3 regarding the events of the material day adding that the accused partially opened the door when they knocked and that when she tried to peep inside the room the accused blocked it with his body and since was stark naked, they retreated because he also told them that Miriam (deceased) was asleep. She further added that the following day, she found their house locked and thought that the two had left for work but on reaching the place of work she found that both the accused and deceased were absent and had not reported for duty that day (2nd May 2018). She further added that on 4th May 2018 she heard the Landlord (PW6) stating that someone had been buried in his plot and that later she realized that it was the deceased who had been murdered and buried there.

9. Gilbert Gitonga M'Rama (PW6) the Landlord of the premises where both the accused and deceased resided testified that he had put up single rooms in two rows where he had 5 rooms on one row and 4 on the other. He further stated that he had labeled the rooms 1 to 9. He recalled that the accused occupied Room No.4 with his girlfriend who reportedly joined him after a month from the time the accused occupied the room. He added that the girlfriend is the one who took up the responsibility of paying rent after the accused had initially delayed paying it.

10. The witness (PW6) further testified that on 4th May 2018 he went to his plot to check around and to have a look at his farm behind the plot where he had planted some maize. He stated that there was a fence that separated the plot where he had put up the said single rooms for tenants and the farm where he had planted maize and that for one to access the farm one had to go through the plot and go through a gate at the fence to access the farm. He told this court that he had gone through the plot and greeted a person he found at the plot and proceeded to the farm and that upon reaching where he had placed some sand he was shocked to see a human behind protruding from the sand and he quickly called people to witness the shocking sight. When the people came, he added that he went near the body and noted that part of the leg had been eaten by what he suspected to be dogs. He further told this court that the body was disfigured and horrible to look at. He added that he went to Magutuni Police Station and reported the incident and came back with the police who collected the body. He told this court that at that time he could not identify the body. He further confirmed that other tenants had previously called him and informed him that a person was likely to be killed in Room 4 and that upon getting the information he called one Mwanzia who had brought and introduced the accused person to him. He told this court that he asked his friend Mr. Mwanzia to talk to the accused which he did after he warned him that he would evict him from his premises unless he changed his behaviour.

11. Dr. James Kitili (PW4) also testified and told this court that he is the doctor who performed post mortem examination on the body of the deceased on 18th May 2018 at the Chuka Hospital Morgue. He told this court that he made the following findings;

i. Eye balls removed (No eyes)

ii. Bruises on the frontal skull

iii. Upper limbs- left arm was chopped off

iv. Deep cut on the left buttock 10 cm long

v. Left thigh and leg depressed upto the bone

vi. Both breasts cut off

vii. Mucous membrane pale indicate of massive loss of blood.

On the basis of the above findings the doctor formed the opinion that the deceased died due to hypodermic shock caused by severe haemorrhage from deep cuts. The doctor then tendered the post mortem report as P. Exhibit 1 and told this court that he signed and issued Death Certificate No. 0852186 and that the body of deceased was identified by Festus Kamero and Lydia Kanini (PW7).

12. Lydia Kanini Ndobi (PW7) the mother to the deceased told this court that the deceased was her first born and that the deceased had previously introduced the accused as her boyfriend to her during a funeral of her sister in law at Magutuni and he knew the accused as a co-worker to her deceased daughter. She recalled that on 3rd May 2008, one Anne Kainyu called her in Nairobi and inquired from her if the deceased had visited her in Nairobi. She further testified that she was later informed that someone like her daughter had been found murdered and that she sent her brother in law Festus Mutwiri who confirmed to her that indeed her daughter had been killed. She recalled going to the mortuary where she identified her disfigured body. She told this court that the body was in a horrible state and it really disturbed her.

13. Sgt William Mwanzia (PW8) a police officer attached to Magutuni Police Station testified that on 4th May 2018 at around 7 pm while at the report office, he received a report about an incident from Gilbert Gitonga (PW6) who reported that he had stumbled upon a decomposing body of a lady. He told this court that he rushed to the scene in the company of 3 other police officers namely; P.C Sindi, P.C Kiprono and P.C Kirimi. He further added that upon reaching the scene they found a decomposing body of a lady partly buried with part of the hand and leg protruding from the ground partly eaten by what he suspected were dogs. He testified that they collected the body and took it to Chuka Hospital Mortuary.

14. The officer also testified that the following day (5th May 2018) he accompanied P.C Sindi back to the scene where they interrogated witnesses and relatives of the deceased. He added that he later arrested the accused and handed him over to DCI for further investigations and action.

15. P.C Isaiah Ugali Wanyama (PW9) an officer with an interesting name told this court that he took over the case from Magutuni Police Station and took statements from witnesses and established that the accused person was the last person seen with the deceased alive and that she was last seen on 1st May 2018. He further told this court that the deceased and the accused both worked for Kiera Hill Ltd based at Magutuni Town. He added that they tried locating the whereabouts of the accused and established that he had escaped to his home County of Kitui where with the help of informers they traced him in Kitui County where they arrested him and escorted him to Chogoria Police Station and later charged with the offence in this case.

16. When placed on his defence, the accused in unsworn statement confirmed that the deceased was his girl friend and they stayed together in one house. He denied murdering her saying that he had left for his home in Kitui when the deceased told him that she could not stay with one man something which made him uncomfortable. He further stated that there were men who used to visit them and they threaten him. He however did not name the alleged persons but insisted on the defence of *alibi*.

17. This court has considered the evidence tendered by the prosecution and the defence offered. In a case of murder such as this, the prosecutions are required to establish and prove the following key ingredients for conviction to be sustained;

i. The fact of death

ii. The cause of death

iii. Actus reus – proof that the accused through omission or commission caused the death of a person.

iv. Mens rea or malice aforethought proof that the act of omission or commission was premeditated or actuated by malice or ill will.

i. The fact of death

18. It is undeniable fact that Miriam Kathomi Kinyua is dead or is deceased. The evidence of the doctor (post mortem P. Exhibit 1) and evidence of her mother Lydia Kanini Ndombi (PW7) corroborated the evidence of the other prosecution witness that in my view established the fact of death beyond doubt.

ii. The cause of death

19. Going by the evidence of the doctor (PW4), the deceased died due to severe haemorrhage caused by deep cuts. She was therefore murdered and the big question is who caused the gruesome murder.

iii. Actus Reus

20. As already observed above, the prosecution's case really hinges on circumstantial evidence and it is a firm position of the law that for a conviction to be founded on circumstantial evidence, the circumstances as per the evidence tendered must be such that they are incapable of any other hypothesis other than the guilt of the person accused of murder.

21. In this instance, the evidence adduced indicates that the accused person was the last person seen with the deceased which is an important factor in reliance of circumstantial evidence. The evidence given by PW1, PW2, PW3 and PW5 all attest to the fact that the accused person was with the deceased on 1st May 2018 when all of them witnessed a commotion in the house of the accused person. They all heard and recognized the deceased scream that material date and time and they also heard noises from her indicative of someone being choked. They had stayed with her for some time and therefore they could recognize her by voice.

22. From the witness accounts on what happened on that material date particularly what happened after PW1, PW2 and PW3 and PW5 heard screams, it is quite clear that all was not well in that Room No.4 occupied by both the accused and the deceased. The said witnesses and in particular Polycena Kawira (PW5) graphically stated that they knocked at the door of the accused and PW5 tried to peep inside to catch a glimpse of deceased person but her view was blocked by the accused deliberately who appeared naked through a partially opened door to put off or keep the ladies (witnesses) at bay. This is because all the 4 witnesses (PW1, PW2, PW3 and PW5) all stated that the accused hesitated at first to open the door and took time to do so after the lady neighbours became persistent in their knocking. He therefore had the time and opportunity to cover himself but chose to open the door partly, appearing completely naked deliberately to put them off.

23. The other pointer that the accused knew more than he told this court in his unsworn statement of defence, is the fact that the following day (2nd May 2018) PW1 saw him come out of his house without the deceased and upon inquiry from PW1 he told her that the deceased had gone for a shortcall in the night and never came back and shortly thereafter, he was seen entering his house before coming with a bag and never to be seen again until after the discovery of the body of the deceased and in his home County of Kitui. He did not report to his place of work on 2nd May 2018 because PW5 states that when she arrived that day (2nd May 2018) both the accused and the deceased had not reported for duty. Why did the accused take off and not report on duty on 2nd May 2018 which was a Wednesday as per the calendar of that year? That to me is suspicious given what was to unravel on 4th May 2018 when the body of the deceased was discovered partly covered indicative of the fact that the killer was in a hurry to bury the body and conceal the murder for sufficient time to enable him run away. I also do not see why the accused did not inquire from his neighbours about the whereabouts of his girlfriend if she had disappeared at night

without trace.

24. The evidence of the neighbours (PW1, PW2, PW3, PW4) and the Landlord (PW6) indicates that the accused had in the past exhibited violent conduct towards the deceased and the Landlord infact had threatened to evict him from his premises on that account.

25. The above factors coupled with the fact that there was a serious commotion on that fateful night at the scene involving the deceased and accused clearly points at one and only person. The accused person herein. He was the only one who had the opportunity to commit the crime he committed because he was the last person seen with the deceased that fateful night. After the incident he unceremoniously disappeared and on 4th May 2018, the partly decomposing body was found partly buried in a farm next to the plot where the accused and deceased stayed. The Landlord (PW6) told this court that the only access to the farm where the body was discovered was through a gate inside the plot where the deceased, accused and other tenants resided.

26. The defence of *alibi* in the face of firm evidence by PW1, PW2, PW3 and PW5 is unfounded. The accused did not tell this court that he had issues with his neighbours that could have made them to fix or implicate him. This court finds that the circumstantial evidence tendered by the prosecution points only to the accused as the person who committed the heinous act.

iv. Malice aforethought/mens rea

27. The evidence of the Landlord Gilbert Gitonga (PW6) and the mother (PW7) to the deceased points a gruesome picture of a murder most foul. The body of the deceased was found in such horrific state that made the Landlord and the mother horrified by the sight. The doctor (PW4) from his findings (post mortem report P. Exhibit 1) showed that the deceased died from a gruesome and grisly death. The injuries suffered by the deceased was caused by extreme violence and ghastly cruelty. Under **Section 206** of the **Penal Code** such actions implies malice aforethought and a court of law will normally take the assumption that the actions were actuated by malice. The said provision states;

“Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances;

- a. An intention to cause death of or to do grievous harm to any person.....**
- b. Knowledge that the act or omission causing death will probably cause the death.....**
- c. An intent to commit a felony.....”**

There is no doubt that the accused intended to cause death to the deceased. He committed the felony and tried to conceal it by burying the body before running away in a vain attempt to get away with the murder. As the saying goes, you can run away but the long arm of the law normally will get you no matter how far you run or how long you hide. The long arm of the law caught up with the accused herein and on the basis of the evidence tendered

I find that the prosecution has established and proved all the ingredients of the offence and connected them to the accused person. He is hereby found guilty and accordingly he is convicted of the offence as charged.

Dated, signed and delivered at Chuka this 29th day of January 2020.

R . K. LIMO

JUDGE

29/1/2020

Judgment signed, dated and delivered in the open court in presence of Kijaru for accused and Maari for State.

R.K. LIMO

JUDGE

29/1/2020.

Court:

This court has considered the mitigation from the convict but the manner in which he committed the murder exhibited extreme cruelty which calls for a commensurate sentence. This is one of such cases that the law must take its course. The convict is hereby sentenced to serve life imprisonment. He has 14 days Right of Appeal.

R. K. LIMO

JUDGE

29/1/2020