



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MALINDI**

**CRIMINAL CASE NO. 14 OF 2017**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**GARAMA KALUME MBOKO.....ACCUSED**

**Coram: Hon. Justice R. Nyakundi**

**Ms. Sombo for State**

**Mr. Gicharu for Accused person**

**JUDGMENT**

The accused person **Garama Kalume Mboko** initially was jointly charged with another, now deceased with the offence of murder contrary to Section 203 of the Penal Code. The particulars of the offence as stated in the charge sheet are that on the 31.5.2017 at Kivuro village in Mrima wa Ndege Sub-location in Vitengeni Division of Ganze Sub-County within Kilifi County murdered **Kadii Charo Kilonga**. The accused persons denied having committed this offence as charged.

At the trial Learned counsel **Mr. Gicharu Kimani** appeared on their behalf while **Ms. Sombo** prosecution counsel represented the state. The strength of the prosecution case was based on the testimonies of the ten (10) witnesses summoned to that effect namely: **PW2 – Kazungu Kilonga Ngala** a brother to the deceased gave chronology of events that the 1<sup>st</sup> accused was known to have an affair with **Kato Charo**, one of the wives to the deceased. This resulted in the matter being adjudicated by the elders in 2013 and the outcome of it was a penalty fine of Kshs.20,000/= to be payable by the 1<sup>st</sup> accused for moral misconduct.

However, the 1<sup>st</sup> accused defaulted in paying the fine. In respect to the 2<sup>nd</sup> accused he also had a love affair with one **Kadii Charo**. It happened that in 2014 **Kadii Charo** was threatened by the 2<sup>nd</sup> accused an incident which ended up being reported to the Assistant Chief of the area (**PW7 – Ezekiel Mwakisha Kazungu**). His evidence was to the effect that on 15.7.2013 a complaint was made to his office by **Charo Kilonga**, husband to the deceased (**Kadii Kilonga**). The case was determined against the 2<sup>nd</sup> accused and ordered to pay a fine of Kshs.13,500/= for trespass into the family of **Charo Kilonga**. The witness identified the mediation agreement marked as MFI – 5. That mediation did not settle the conflict, according to PW7 on 26.5.2017 the deceased reported an incident involving the 2<sup>nd</sup> accused who while armed with a panga threatened her life. This time round the complaint was reported to Bamba Police Station. On 31.5.2017 (**PW7**) received information on the death of the deceased.

**PW3 – PS** a niece to the deceased testified that on 31.5.2017 she was at the farm with (**PW4**) **BS** picking vegetables. PW3 heard some cries of a human being from a nearby forest. She nevertheless moved closer to the scene of the screams and she yielded closer she saw the accused persons assaulting the deceased. According to her evidence, she did not report this incident on the attack upon the deceased to anybody. She later explained that the deceased body was found floating on a nearby river where the beating took place. PW4 description of the events of 31.5.2017 was in all material disclosure and relevance with that of PW3 as they happened to be together. When the alleged incident on the assault of their auntie, (deceased) did occur.

**PW5 – Ngumbao Kajole Loja** a brother to the deceased testified that on 31.5.2017 he was on a duty at his shop when the 1<sup>st</sup> accused purchased flour and soap. According to PW5, the accused appeared disturbed but as soon as he left the shop a message came in that the deceased has been murdered.

**PW6 – Chuma Sofa Masha** testified as a neighbor to the accused persons, according to the witness on the 31.5.2017, he saw the 1<sup>st</sup> accused visit the shop to purchase flour and soap. That the 1<sup>st</sup> accused stayed within the surroundings of the shop until he fell asleep. He also

observed that the 1<sup>st</sup> accused at all times appeared disturbed.

**PW8 – Samson Saidi** on oath also narrated the events of the fateful day when he received information on the death of the deceased. He confirmed that upon reporting the incident to the police her body was taken out of the scene for Kilifi Hospital Mortuary. Speaking on the issue of adultery between the 2<sup>nd</sup> accused and deceased (**PW8**) told the Court that the claim was heard by the Assistant Chief and a fine of Kshs.10,000/= was imposed as a sanction of his misbehavior. (**PW8**) also made reference to threats of violence by the accused against the deceased prior to her death.

**PW9 – No. 65240 Sgt Owuor Steve** attached to Ganze Police Station had an opportunity to investigate the incident on the murder of the deceased whose body was recovered floating on a river. He visited the scene and drew a sketch plan which he produced as exhibit (A) & (B).

**PW10 No. 4983 Sgt Wanjala** testified on the role he played as a co-investigator with regard to the murder of the deceased. He narrated on the steps taken to interrogate the witnesses, retrieve the mediation agreement from the Chief produced as **exhibit -5**, the school extract register where both (**PW3**) and (**PW4**) happened to be pupils – admitted as exhibit 2 & 3. The bundle of clothing wear worn by the accused produced as **exhibit 4 (A) (B)** respectively. Finally, (**PW10**) told the Court on the contents of the OB extract 21.6.2017 on the complaint made by the deceased. (**PW10**) later recommended a charge of murder against the accused persons.

On the cause of death **PW1 – Dr. Ndolo Kailu** gave evidence on behalf of **Dr. Noorein** with regard to the autopsy report dated 8.7.2016. The medical officer told the Court that prior to the death of the deceased there were obvious injuries to the skull. He further opined the cause of death to be severe head injury. The post-mortem examination was produced as **exhibit 1**.

At the close of the prosecution case accused person Garama Kalume was placed on his defence. The first accused died during the pendency of the trial.

In the second accused defence, he denied the charge. He however acknowledged being prosecuted before the Chief for having an affair with the deceased which ended up for him being fined Kshs.10,000/=. He admitted making part payment of the fine of Kshs.5,000/=. That on payment of the fine he stopped having an affair with the deceased. The accused also attributed to the incident of the affair and subsequent death of the deceased occasioning him psychological stress which pushed him to attempt suicide.

#### **Determination**

The question for consideration therefore is whether the prosecution has discharged the burden of proof that the accused committed the offence of murder against the deceased. The rule on the burden and standard of proof was firmly established by the **House of Lords in Miller v Minister of Pensions {1947} 2 ALL ER 372, Denning J** stated:

*“That degree is well settled. It need not reach certainty, but it must carry a high degree of probability proof of beyond reasonable doubt does not mean proof beyond a shadow of doubt. The Law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible but not in the least probable, then the case is proved beyond reasonable doubt, but nothing short of that will suffice.”*

The offence of murder as provided for under Section 203 of the Penal Code requires that for an accused person to be properly convicted the following elements must be proved by the prosecution beyond reasonable doubt:

- (1). The fact of death of the deceased.*
- (2). That the death was unlawful without any justification or excuse.*
- (3). That the death was actuated with malice aforethought.*
- (4). That the accused can be squarely identified as the perpetrator of the crime.*

On element No (1) the facts are very clear from **PW1 – PW10** that **Kadii Charo Kilonga** is dead. On the issue of unlawfulness of the death (**PW3**) and (**PW4**) testified that on 31.5.2017 they were initially attracted by the screams of a human being from the nearby forest. **PW3** and **PW4** were picking vegetables in the farm at the time of the forceful screams. Thereafter, (**PW3**) and (**PW4**) explained that they proceeded to the scene and a few meters to location of the forcible and violent felony of assault they managed to witness the beatings by the accused persons against the deceased. Having so found, they retreated back home until the matter became known to the police requiring them to record witness statement on what they were able to see on that particular day and time.

The circumstances under which the offence was committed took the form of an assault which inflicted fatal wounds to the head of the deceased. The harm caused as traceable to the accused persons is corroborated by the post-mortem report examination **exhibit 5** by **Dr. Noorein** whose report was produced in Court in support of the unlawful act, or omission which resulted in the death. It's a particular importance in this case to note that the deceased injury concentration was on the head. It was established by (**PW1**) that the cause of death was that severe injury to the head.

In this regard on the facts of this case, the death of the deceased was unlawful in nature in breach of Article 26 of the Constitution and Section 203 of the Penal Code.

The next issue to consider is whether the necessary element of malice aforethought for the offence can be correlated from the evidence. The elements of malice aforethought are well set out under Section 206 of the Penal Code as follows: That malice aforethought shall be deemed to be established by evidence proving and manifesting either of the following circumstances.

*(a). An intention to cause the death of any person, whether such person is the person actually killed or not or to do grievous harm.*

*(b). Knowledge that the act or omission causing death will probably cause the death of some person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death is caused or not or by a wish that it may not be caused."*

For instance in the cases of **Mugao & Another v R {1972} EA 1EA 543**, **Bukenya & Others v Uganda {1972} 1EA 549**, **Ernest Asami Bwire Abanga alias Onyango v R CACRA No. 32 of 1990**, **Rex v Tubere s/o Ochen {1945} 12 EACA 63**, **Karani and 3 others v R {1991} KLR 622** Provides the characteristics and distinguishing features to look for in a case to case basis whether malice aforethought preceded the unlawful act to cause death of the deceased.

*"It was observed, to determine whether or not the prosecution has proved malice aforethought, Court takes into account the circumstances surrounding each particular case. The circumstances include the nature and type of the weapon used, the gravity and multiple injuries inflicted, the parts of the body injured, the conduct of the assailants before, during and immediately after the injuries were inflicted."*

I also hasten to add that not only may malice aforethought be present when there is no actual design to kill or injure, it may even co-exist with a definite wish that such harm may be avoided. If the unlawful act is voluntarily done with the knowledge that it may cause death or do grievous harm to the victim.

By drawing the line at intent to kill or cause grievous bodily harm a clear determinant and satisfactory difference is made between the homicide of murder and that of manslaughter. Review of the above cited cases are in agreement that under Section 206 on malice aforethought the prosecution must prove beyond reasonable doubt that when the accused went about assaulting the deceased he knew that it was highly probable that that act would result in death or serious bodily harm. In **Can lifie v Goodman {1950} 1KB 237 Asquith L. J** summarized the ingredient on malice aforethought as follows:

*"An intention to my mind connotes a state of affairs which the party intending I will call X does more than merely contemplate; it connotes a state of affairs which, on the contrary, he decides, so far as in him lies, to bring about, and which, in point of possibility he has a reasonable prospect of being able to bring about by his own act of volition."*

In the context of the whole evidence properly obtained and expressed by both the prosecution and the defence I hold the following view on the matter in relation to malice aforethought. The evidence presented by **(PW3)** and **(PW4)** shows that the accused person and another not before Court kidnapped the deceased and took her inside a forest where they exerted violent force so as to cause death or injure her seriously. The injuries the deceased sustained were in her vital parts of the body identified during the post-mortem to be the head. The medical officer **(PW1)** description of the injuries established during the post-mortem examination and the cause of death are all consistent with the use of deadly weapon and force.

What emerges from the evidence of **(PW9)** and **(PW10)** not only did the perpetrators harm the deceased but they dumped her body in a nearby river. There is sufficient evidence from **(PW3)** and **(PW4)** to conclude the proponents of the potential lethal harm was the accused person and his deceased accomplice. There is further conduct of removing the body of the deceased from the crime scene is clearly reprehensible and hence sufficient connection between the accused unlawful act and malice aforethought resulting in the death.

I am of the strong view that the unlawful act of such nature by the accused done in the prosecution of a further purpose which is unlawful imports the element of reasonable foreseeability that all what was intended in the circumstances is the death of the deceased. It is certainly arguable that the prosecution has discharged the burden of proof of beyond reasonable doubt for the manifestation of malice aforethought.

So far so good under Section 206 of the Penal Code on malice aforethought. From the evidence of **(PW3)** and **(PW4)** which is the only cogent direct evidence on this crime, and for that matter does import the provisions of Section 21 of the Penal Code approach on common intention.

The four elements that must be satisfied at the outset and with the aid of subsequent evidence to prompt a decision under the provisions against an accused person involves the following:

*(a). A criminal act.*

*(b). Participation in the doing of the act.*

*(c). A common intention between the parties and*

*(d). An act done in furtherance of the common intention of the parties (See also the principles in R v Cheya {1973} EA).*

This case looked at holistically draws also from the settled principles on circumstantial evidence as elucidated in **Rex v Kipkering Arap Koskei & Another {1949} 16 EACA 135** where the Court held inter alia that:

***“On circumstantial evidence, each link in the chain must be closely and separately examined to determine its strength before the whole chain can be put together and a conclusion drawn that the chain of evidence as proved is incapable of explanation on any reasonable hypothesis except the hypothesis that the accused is guilty of the charge.”***

On my part, I have evaluated both the prosecution and defence narrative all pointers connect the accused with the crime. In view of the evidence rendered by (PW3) and (PW4) they conspired to commit the crime of murder against the deceased. The common unlawful purpose was to hold up unto the deceased in the forest and assault her to death. Thereafter they did dump her body in the river to dispose it as a self-drowning transaction which had no involvement of the duo or a third party to the offence. I am convinced that not only did the accused and another form a common intention to prosecute an unlawful purpose, but they also had malice aforethought to execute the plan of killing the deceased.

Finally, what is the velocity of reliability of identification evidence. The prosecution case therefore depended upon the evidence of (PW3) and (PW4). It was their evidence that they had recognized the accused with another beating the deceased.

In accordance with identification evidence the guidelines on the threshold to be met is now crystalized in the cases of **Roria v R {1967} (EA) 583, Abdalla Bin Wendo v R {1953} 20 EACA 166, R v Turn bull {1972} 1ALL ER**. The evidence on record by (PW3) and (PW4) does disclose that the incident happened under favourable lighting conditions that enable recognition to take place of the accused. It is clear that there was prior association of the accused with the deceased during which the witnesses knew each other very well indeed. As far as the incident is concerned it is clear that the accused who led the attack was not obstructed to impair a positive identification from the vantage point taken by (PW3) and (PW4).

In the circumstances of the case, the witnesses had time to observe the accused, from a safe distance to the scene, there was sufficient light and stated they knew accused person very well. Here was a prosecution case based entirely on consistent tested corroboration evidence on recognition. Therefore, there is no need in warning myself in those circumstances under the directions given in the above noted authorities.

It is safe and strongly credible to rely on their evidence to determine the factor on recognition to identify the killer to be the accused person. Lack of holding an identification parade by the police did not occasion a failure of justice to warrant this Court resolve a benefit of doubt in favour of the accused motive.

In assessing the features of the accused defence as set out in his testimony, the picture painted by the prosecution discharges the burden of proof beyond reasonable doubt. That version by the accused was never a true story of what reasonably happened on the fateful day of the murder.

For all I have stated above, I find the accused person guilty of the offence of murder contrary to Section 203 against **Kadii Charo Kilonga** on 3.5.2017 and accordingly convict him of the offence.

#### **Sentence**

I have considered the formidable submissions by Learned Counsel **Mr. Gicharu** on mitigation on behalf of the convict. The state on its part made no significant submissions towards the verdict on sentence inspite of that I am able to establish that this is an offence committed under aggravating factors of use of violence. However, being guided by the principles in the **Supreme case of Muruatetu v R {2017} eKLR** it would be completely in appropriate to impose a death sentence in this regard. I bear in mind that the convict is a first offender with no related previous convictions.

It was explained to the Court by **Mr. Gicharu** that the convict has reflected on his wrongful acts and does regret the offence he committed against the deceased. In my view, there is no dispute that the mitigating factors outweigh the aggravating ones which are deducible from the analysis in the Judgment.

The Court position given the circumstances of the case is to sentence the convict to a custodial sentence of thirty (30) years imprisonment with effect from 24<sup>th</sup> August 2017.

14 days right of appeal explained.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 30<sup>TH</sup> DAY OF SEPTEMBER 2020**

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**R. NYAKUNDI**

**JUDGE**