



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL CASE NO. 82 OF 2015

REPUBLIC.....PROSECUTOR

VERSUS

ROSE THIRIKWA IKIAO.....1ST ACCUSED

STANLEY KAROTI MERIMBA.....2ND ACCUSED

J U D G M E N T

1. Rose Thirikwa Ikiao (1st Accused) and Stanley Karoti Merimba (2nd accused) were charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code Cap 63 of the Law of Kenya.

2. It was alleged that on 12/10/2015 at Karia Sub Location Nchooro Location, Tigania West Sub-County jointly with others not before court, the accused murdered **Simon Kinoti Limungi**.

3. Prior to his demise, the deceased lived in Ngundune Village at Karia Sub-Location. He had retired from the civil service in early 2015 to live in the village. His compound is said to have had two houses, the main house and another house in which **Pw1 David Ng'olua** was sleeping on the material day.

4. To access the homestead, one had to go through two gates, an outer gate that led to an inner gate that will let one into the compound. The compound was well fenced with Kei Apple. The deceased also kept a ferocious dog to enhance the security of the home.

5. On the material day, the deceased was with **Pw9 Julius Mathiu** at the latter's bar from 7.00 pm until 10.00 pm when **Pw10 Jackson Maore**, a motor cycle rider picked the deceased and dropped him home. On reaching the deceased's home, **Pw10** opened the first gate for the deceased who paid him Kshs.100/- and he left him inside the first gate as he went away to his home. **Pw9 and Pw10** would later that night learn of the deceased's demise.

6. On the same day at about 10.00pm, **Pw1 David Ng'olua** was in his house within the homestead of the deceased. He heard cows mooing outside and he peeped through the window to see what was happening. He saw three people, two talking to the 1st accused at the door of the main house while a 3rd one was standing next to his window.

7. The electric lights both inside the main house and outside were on but he did not recognise the three people. He saw the deceased lying about 3 metres from where the accused was canvassing with the two people. The 3rd person standing next to his window warned him from coming out lest they also kill him. He went back to sleep but after some time, he came out of the house and found the 1st accused in the main house. She also came out and screamed and neighbours came.

8. Pw2 Peninah Ndiria's house boarder's the deceased's compound. On the material day at about 10.30 pm, she was in the kitchen cooking. She stepped out to collect firewood. She heard some commotion from the deceased's compound. She tried to call **Pw1** but there was no response. She went back to her kitchen.

9. Shortly thereafter, she heard a bang on the deceased's gate as if being opened. She went outside and saw the 1st accused go into her house. She again saw the 1st accused emerge from her house and ask **Pw1** what was happening. She then the deceased who had beat him. **Pw2** then screamed and rushed with her husband to the deceased's home. The gate was locked. They were joined by other neighbours at the gate.

10. The 1st accused sent **Pw1** who came and opened the gate for them. On reaching the compound, they found the deceased lying on the ground with injuries on his neck. He was taken to hospital where he died. It was only the 1st accused and **Pw1** who were within the

compound.

11. **Pw3 Irene Kinoti**, a daughter of the deceased, told the Court how the 1st accused had come to live with the deceased after the demise of **Pw3's** mother. That the relationship between the deceased and the 1st accused was stormy and the deceased kept complaining about her. The deceased once told her that the 1st accused had organised people to pay her own dowry, a ceremony the deceased refused to attend. Shortly before his demise, the deceased had planned to make a Will in the offices of an advocate by the name Muia. She was informed of his death on 13/10/2015 and she attended the post-mortem.

12. Another daughter of the deceased **Pw4 Josephine Kinoti**, received the news of the deceased's demise while in Japan. She returned back and attended his burial on 25/10/2015. On making inquiries of what was stolen, she was informed that the deceased's national ID Card and ATM as well as the 1st accused's phone got lost on the night of the attack. These items would later be recovered from the bedroom of the deceased together with a broken Sim Card which were handed over to the investigations officer.

13. On the morning after the incident, **Pw5 Geoffrey Karaituma** accompanied the area chief to the home of the deceased. They found the fence to be intact and there was no evidence of any intrusion. **Regina Karwitha and Joseph Kiao M'Abutu (Pw6 and Pw8)** a sister and father respectively of the 1st accused would later hear rumours that their family had planned the deceased's murder which they reported to the police. **Pw7 Lydia Katwana Mwika** denied circulating the alleged rumours that the family of the 1st accused had planned the murder.

14. The case was investigated by **Cpl Njuguna Kinuthia (Pw11)**. On the morning of 13th October 2015, he and his colleagues visited the scene. He noted blood on the ground three meters from the entrance to the sitting room of the main house. He interviewed **Pw1** and the 1st accused. He established that the inner compound was secured with a fence of barbed wire and Kei apple with a steel gate. The outer compound had a live fence of Kei apple and also a steel gate.

15. He also established that there were ferocious dogs in the inner compound but on the material night they were locked in on the instructions of the 1st accused. He investigated the Mpesa account of the 1st accused and her mobile communication. The Safaricom reports revealed that the 1st accused had communicated with the 2nd accused ten times on the material day and had earlier sent him a total of Kshs.4,000/-. When questioned, the 1st accused denied knowing the 2nd accused. He also established that the relationship between the deceased and the 1st accused was frosty.

16. **Pw11** further testified that the 1st accused had stated in her statement that she had lost her phone and that the deceased's identity card and other documents had been stolen by the attackers. However, on 6/11/2015, he was called by one of the children of the deceased who informed him that they had recovered the mobile phone make Nokia X2 together with the broken sim card and the deceased's Id Card from the 1st accused's bedroom.

17. He attended the post-mortem which revealed a total of 17 stab wounds. He produced the post mortem report as **Pexh 1**. He also produced the phone and the broken sim card as **Pexh 2a and 2b**, the Safaricom data and Mpesa account as **Pexh 3 a and 3 b**, respectively.

18. When put on her defence, the 1st accused denied having any dispute with the deceased during his life time. That on the material day, after she finished cooking, she left the kitchen which was separate from the main house and went to the main house. While preparing to have a bath, she heard **Pw1** shout "*Kwendeni nyinyi waizi wakora shetani.*" (loosely translated to mean "go away you thieves, thugs, devil).

19. She went outside and flashed a torch and saw the body of the deceased lying on the ground. She called **Pw1** to come out of his house. They started screaming. **Pw1** went to open the gates to allow in the neighbours to come and offer help. The deceased was rushed to hospital but she was prevented from accompanying him. The following day, she learnt that he had passed on.

20. She stated that **Pw1** had never mentioned anywhere that she spoke to the attackers before he testified in court. She denied **Pw3's** allegations that she was not living peacefully with the deceased. She produced the obituary which had identified her as the deceased's wife. She explained that the dogs were locked in on that day to prevent them from pulling down the clothes that were on the drying line. She further testified that the children of the deceased broke into her bedroom and removed her phone, sim card and the deceased's Id Card when she was in custody. As regards her relationship with the 2nd accused, she told the Court that he was medicine man who was supplying her with herbs.

21. In his submissions on behalf of the 1st accused, **Mr. Kimathi** submitted that the evidence of **Pw1** was not truthful. That he had not told the Police that he had seen the 1st accused converse with the attackers. That there was no evidence that the 1st accused and the deceased were in a quarrelsome relationship. Counsel relied on the decisions in **Republic v Jared Bongonko Kibagendi [2019] eKLR**, **Republic v John Kamau Wanaina [2016] eKLR**, **Republic v Mika Jerobon Chumba [2017] eKLR** in support of his submissions the state filed no submissions.

22. The accused face a charge of murder. To secure a conviction, the prosecution must prove beyond any reasonable doubt; the fact of death of the deceased, the cause of such death, that the death was caused by the unlawful act or omission on the part of the accused and that the accused had malice aforethought.

23. After the close of the prosecution case, the Court found that the prosecution had not disclosed a prima facie case against the 2nd accused and acquitted him. The reasons were to be contained in this judgment. Throughout the prosecution case, no one mentioned the 2nd accused in relation to the murder.

24. The only witness who mentioned him was the investigations officer. He suspected the 2nd accused because of having received Kshs.4,000/- from the 1st accused in September, 2015. Further, because of the 10 calls that the 1st accused made to the 2nd accused between

17.52 hrs and 20.03 hrs on the fateful day.

25. He admitted that he never sought to establish why the money was being paid nor why the two had the many calls at the material time. Mere suspicion is not enough. The witness should have sought an explanation from the two during his investigations. If the 2nd accused chose to keep quiet, a verdict of guilty could not be returned against him. More is required than mere suspicion to require a person to answer to any charge against him. For the said reason, the 2nd accused was acquitted.

26. I now turn to the 1st accused. On the fact and cause death, **Pw1, Pw2, Pw11** testified that on the material night, the deceased was attacked and later died in hospital. The Post Mortem report produced as **Pexh1**, revealed that the deceased had 20 stab wounds (17 on the front and 3 at the back). Both legs had grazes and bruises. The doctor opined that the cause of death was multiple stab wounds to major organs (heart, right lung and liver) that led to exsanguination. I therefore do find that the prosecution had established to the required standard, the death and cause of death of the deceased.

27. The second issue is whether the death of the deceased was caused by an unlawful act or omission of the 1st accused. The prosecution case is solely based on circumstantial evidence. In **ABANGA alias ONYANGO V. REP CR. A NO.32 of 1990(UR)**, the Court of Appeal set out the principles applicable in such a case. It stated:

“It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: (i) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established, (ii) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused; (iii) the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.”

28. **Pw1** told the Court how he saw three people within the compound on the material night. He alleged that he saw the 1st accused converse with two of them. Although the 1st accused did not specifically deny this part of the evidence only stating that **Pw1** had neither told the police nor the funeral committee, the Court will exclude the same on the authority of **Republic v. Jared Bogonko [2019] eKLR**.

29. However, **Pw1** was emphatic that a few minutes after being threatened by the 3rd attacker who was standing next to the window, he decided to go out. He found the deceased lying on the ground with injuries. It is after he called out on the unresponsive deceased that the 1st accused came out and tried to call the deceased asking him who had beaten him

30. The evidence of **Pw2** was also crucial. Her house neighbours that of the deceased. When she got out of her kitchen to pick firewood, she heard some commotion from the compound of the deceased. She called **Pw1** but there was no response. She later heard the gate of the deceased being banged. When she stepped out, she saw the 1st accused go into her house. Shortly thereafter, she saw her again emerge from her house and call **Pw1** asking him what was happening. It is then that she heard the 1st accused ask the deceased who had beaten him.

31. The 1st accused's defence was clear. She was preparing to bath when she heard noise outside. She went outside and then realized that it was **Pw1** who was shouting “*kwendeni nyinyi waizi wakora shetani*”. That when she flashed her torch, she saw the body of the deceased on the ground. That she then called **Pw1** to come out of his house. They then started to scream. That she used a torch because it was dark.

32. When **Pw1** testified, he was clear that, when he saw the three people, there was light both inside the main house and outside. That the next time he came out, the security lights had been switched off. He stated that he was the first to come out of the house and that he is the one who called the 1st accused who was at the time in her house. This testimony was not denied nor challenged.

33. It was crystal clear that the deceased was murdered 3 meters from the door step to the sitting room of the 1st accused. She never heard the commotion until **Pw1** came out of his house to call the deceased and find him critically injured. The compound was well secured. Those present that night within the compound were **Pw1** and the 1st accused. **Pw5** visited the scene the following morning with the area chief. The Kei apple fence had not been violated. There had been no intrusion whatsoever into the compound through the fence. It is clear then that the attackers came through the gates and went away through the same gates. The gates were in both occasions opened for the attackers.

34. The only irresistible conclusion is that; the attackers had been admitted into the compound way earlier that night. They were held there waiting for the deceased to return. Once he was dropped by **Pw10**, he secured the outer gate. He then went through the inner gate and on reaching the doorsteps of his house, the attackers pounced on him. After they were through with their heinous mission, the gates were opened for them and they left. The gates were then securely locked that is why when **Pw2** and the other neighbours came to help, they found the gates locked and the 1st accused had to order **Pw1** to open the gates for them.

35. The evidence unerringly points towards the connivance and or participation of the 1st accused for the following reasons; **Pw2** heard the deceased's gate banged and when she stepped out, she saw the 1st accused go towards her house shortly thereafter she saw her come out and start asking **Pw1** what was happening. The conclusion the court makes is that, the 1st accused went opened the gates for the attackers to leave, then she returned to her house and that is when **Pw2** saw her.

36. The other issue is, the 1st accused ordered that the dogs be kennelled on the fateful night. I reject her explanation that because it had rained and the clothes were on the drying line, there was a likelihood that the dogs would pull the clothes down. The dogs must have been kennelled so as to allow the attackers carry out their mission unhindered. **Pw 11** stated that he tried the dogs while clothes were on the drying line and they never pulled them down. It defeats logic how one would prefer clean clothes to personal security. It does not add up.

37. The lights were on but were switched off later. This was to allow the attackers to have safe passage. It was not denied that the lights has

been switched off that is why the 1st accused stated that she came out with a torch and flashed to see the deceased body lying near her door step.

38. **Pw3 and Pw4** were categorical that the relationship between the deceased and the 1st accused was rocky. They were firm that the 1st accused had been chased by the deceased to her home severally. That although she had been pushing to be legally married by the deceased, it never came to pass. She thereafter decided to arrange the payment of her own dowry! The deceased did not attend that ceremony and he is said to have banished from his home his brother and sisters who took part in the dowry payment ceremony. **Pw8**, the father of the 1st accused confirmed this fact. The Court saw the witnesses. The testimony of **Pw3, Pw4 and Pw11** was consistent, firm and the court believed them on this.

39. The 1st accused was not only dismissive, the Court found her to be evasive and did not believe her. Her testimony was that **Pw3 and Pw4** were lying on her relationship with the deceased. The fact that there had been no report to either the chief or other authority cannot *per se* be evidence that her relationship with the deceased did not have ups and downs. Not every man goes out to parade his marital woes in public. **Pw8's** evidence that the relationship between the deceased and the 1st accused was excellent must be taken with a pinch of salt. The 1st accused is his daughter. He was not living with couple to tell how they related. In any event, he purported to accept dowry for the 1st accused in the absence of the suitor without butting an eyelid or asking why the suitor did not attend the ceremony.

40. Further, **PW10** the motorcycle rider who always dropped the deceased home told the Court that the deceased had warned him about women. He felt that the deceased was not in a good marital state.

41. It also came out that the 1st accused told the children of the deceased, **Pw3 and Pw4** in particular as well as **PW11**, that on the night of the incident, her mobile phone, the deceased's Id Card and ATM Card got lost. However, these were later recovered from her bedroom after its door was broken. She neither challenged this evidence nor denied it. She only stated that they were recovered from her bedroom while she was in custody. The Sim Card that was recovered must have been broken purposely to destroy any evidence that it would have contained.

42. The foregoing facts form a chain that is so complete and that unerringly point towards the guilt of the 1st accused. She was part of a common intention. She assisted the attackers in their mission of doing away with the deceased. She must have been the one who allowed them into the compound through the gates, harboured them until they executed their mission, then she gave them safe passage and locked the gates behind them. She was but firmly part of the common intention that enabled the elimination of the deceased. I find that the prosecution proved the 3rd issue to the required standard.

43. As regards malice aforethought, when the 1st accused participated in the common intention by which the attackers stabbed the deceased 21 times, she very well knew and intended that he suffers grievous harm from which he died. I also find that she had malice aforethought in the execution of the common intention.

44. Accordingly, I find that with malice aforethought, the 1st accused unlawfully caused the death of **Simon Kinoti Limungi** and I accordingly convict her of the offence of murder, as charged, under **section 322 of the Criminal Procedure Code**.

Signed at Meru: -

A. MABEYA

JUDGE

DATED and DELIVERED at Meru this 17TH day of September, 2020.

F. GIKONYO

JUDGE