



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**CRIMINAL CASE NO.92 OF 2015**

**REPUBLIC .....PROSECUTION**

**VS**

**RESTUS GITHINJI GITONGA.....1<sup>ST</sup> ACCUSED**

**PENINA KANANA MWENDA.....2<sup>ND</sup> ACCUSED**

**JUDGMENT**

The accused persons Restus Kithinji and Penina Kanana are jointly charged with the offence of murder contrary to section 203 as read with section 204 of the penal code.

The particulars are that accused persons on 15<sup>th</sup> day of December 2015 of Nkabu Sub-location Imenti South District within Meru County jointly with others not before the court murdered Lucy Kagendo Mwenda.

PW1 testified that when his house was broken into using 3 stones from the nearby quarry the attackers kicked him and he fell on a chain. He directed the attackers to where his trouser was with 250/= and ID card but they went for his wife and started cutting her. PW1 said he was able to identify the voice of A1 the son to his brother who allegedly said “*Wacha Nyamazeni*”. PW1 said A1 could drink and then start talking carelessly saying he wanted PW1 to give him his land. He said that he had leased the quarry on his land and he had been paid. He said his daughter Wanja and son Erick were sleeping in separate houses 7 m and 10 metres respectively away. He said the attackers had masks and he was not able to identify them physically. He said A2 is his 2<sup>nd</sup> wife and she used to stay at Mitunguu market 1KM away from home. He said the deceased told him she had differed once with A2, 2 years earlier than date of offence. He said it was a small disagreement and the deceased and A2 subsequently lived harmoniously and even supported each other. He confirmed he didn’t tell police which words were uttered that made him recognize his voice of the person who spoke as that of A1. He said he didn’t tell neighbours who responded to alarm that he had recognised the voice of A1. He said it was Anne Wanja who made report.

PW2 testified that the deceased once told him she feared she was going to die for reasons that she was not in good terms with her co-wife A2.

That the deceased told her that once they almost died in the house when someone she suspected was A2 poured paraffin on their house. That on 15.12.2015 she received a phone call from Gakii, a neighbour of the deceased who reported to her that robbers had attacked the deceased persons house. That Wanja and Munene went the following morning and told her their mother had been cut and was taken to hospital. Later she got information that Lucy had died. She said that the deceased reported to her that A2 had issued threats to her. She said A2 and the deceased had even fought. PW2 said she was not aware if the deceased reported to police the threats made to her by A2.

PW3 – Peris Kairuthi said the deceased was her neighbour and her friend as well as business partner. PW3 said the deceased used to seek advise from her as they used to fight with her co-wife A2 herein. She said A2 frequently went to deceased persons house to get her husband and they ended up fighting with the deceased. She said that in 2014 A2 went with a panga and that it is PW3’s – husband who separated them. She said she witnessed the wrangles between the deceased and A2. She said she was not at scene of murder and she didn’t tell police that A2 killed the deceased.

PW4 Zainabu Wawira testified that she used to do business with the deceased, while A2 was her tailor. That A2 told her that there was a woman who had bewitched her and that is why school fees had not been paid for her child but didn’t say which woman. That later the deceased told her she kept on dreaming she was being killed.

That when she learnt from the deceased that A2 was her co-wife she asked whether the deceased was the one A2 referred to as a witch. That within the same week she learnt deceased had been killed. She said she didn’t know if A2 killed the deceased.

PW5 Anne Wanja daughter to deceased and PW1 said that on 15.12.2015 after dinner the family members including PW1 the deceased, her brother and sister went to sleep at around 8.00 pm. That at around 3.00 am she was woken up with screams and when she tried to open her door she found it was locked from outside. That she started screaming and she heard a voice and he recognized as that of A1, say –“Nyamaza wewe”. She said A1 is her close cousin.

That she went under the bed and continued screaming. That after 20 minutes she heard footsteps running away. She said the foot steps were for many people. That PW1 got out of the house shouting/calling her name and saying her mother had been killed. That when her father opened for her she went to the house where her mother was and she found she was lying in a pool of blood and her white petticoat was stained with blood as well as the curtains in the house. That her mother was taken to hospital in a neighbours car and police were called to scene.

That at 5.00 am in the morning her brother picked a belt buckle at the door and it was identified to belong to A1. She said her mother and A2 used to quarrel. She said the source of dispute between her mother and A2 was a quarry in their shamba. She said in cross examination that she didn't indicate in her statement that there was a quarry in their shamba. She said her parents leased out portions of the quarry but had not been paid. She said A1 went home and PW1 gave him 5000/= to construct a small house. She said A1 used to sleep in the banana plantation around the home. She said that A1 used to tell them he had rented a house in Gakoromone but it was not true. That on 12.12.2015 A1 went home while armed with a panga and asked for Christmas and the deceased gave him food. That on the maternal day at 3.00 am there was no light. She said she told her brother she heard the voice of A1. She said the police misplaced the buckle that they had picked and it was not in court when she testified. She said she was with sister Cindy in same house. She said her brother Erick escaped through the window when their parents were attacked. She said that PW1 said he didn't recognize the attackers. She said that she didn't know why PW1 didn't protect the deceased. She said PW1 had no injuries at all. She said whenever PW1 got money from the quarry he could take it all to his 2<sup>nd</sup> wife and the deceased didn't like it as they were in school.

In re-examination PW5 said that relationship between PW1 and her mother was not good. She said PW1 chased the deceased away when PW5 was one year old and the deceased was pregnant and she only returned in 2007 when elders went for her at the instance of her grandfather. She said PW1 was not staying with them until 2013 when he returned. She said A2 could follow PW1 at the deceased home and beat him.

PW6 Catherine Kinanu testified that Erick Munene went at 3.00 am to wake her up saying that his other was being killed. That she accompanied Erick back home and she could hear screams. That they found Ericks mother lying down with cuts all over and could not talk. That neighbours came and one who had a car Lillian Mutugo took the deceased to hospital. PW6 said the deceased and A2 used to quarrel every time she said when they arrived at the scene she didn't talk to Anne Wanja – PW5. She said that Anne Wanja and her siblings were moved to another location because of pain and sorrow they experienced.

She said that PW1 and PW5 recorded statements and said it was A1 who committed offence. She said she didn't tell police about the assault of deceased by A2 when she recorded her statement.

PW7 Jacinta Ngugi said A2 was her customer and a neighbour at the plot. She said that in 2015 A2 asked for 5000/= from her but she didn't have. She said the reason A2 wanted 5000/= was to pay people who could kill her co-wife the deceased herein.

She said she told A2 that her plan was not good and she even stopped visiting her. That on 16.12.2015 while she was on duty she learnt Lucy had been killed and that at 12.00 noon she was called to the office where she found 3 CI officers who interrogated her and she told them what she knew and her statement was recorded. She said she didn't report what Penina told her as she didn't expect she would kill Lucy.

She said she didn't know Lucy by the time Penina told her she had plans to kill her. She said she didn't share the information with anyone else and she didn't know who told the CID. She said she was Penina's customer and Penina had made for her a skirt. She said she became close to Penina when she started going to her shop for chats.

PW8 Erick Munene testified and reiterated what PW1 and PW5 said about the attack on the night of 15.12.2015. he said he was woken up by screams from her parents house at 3.00 am. He said it is the deceased who was calling for help but when he tried to open the door, he found it had been locked from outside. He said his sister Wanja PW5 who was in a separate house was also screaming. PW8 said he managed to get out through the window. He said that when he was outside he heard a male voice warning his sister to shut up. He said he recognized the voice. He said the person spoke in Kimeru and said “Nyamaza Nyamaza Kira”

He said that it is only the voice he heard and he didn't see anyone as ran to their neighbour Mr Muthuri's home and called them to come and help his parents who were under attack. He said that it took sometimes for him to convince the neighbour to come out and it was after about 20-30 minutes that Mr and Mrs Muthuri accompanied him back home and they found assailants had already escaped. He said the mother was cut but the father was not injured. He said the deceased had multiple cuts all over the body. He said he found the deceased lying on a seat. He found many neighbours had come. A neighbour with a car took the deceased to Nkubu Mission Hospital. That the following day Reverend Munara went home and informed them their mother had died. He said that when police visited the scene a belt buckle was picked and he identified it as belonging to A1 herein. He said the voice he heard telling his sister to shut up was for A1 his cousin. He said that PW1 had 2 wives and that A2 once came home and attacked the deceased. He said he usually saw A2 with A1 at her shop in Mitunguu. He said the relationship between A2 and the deceased was not good and that she used A1 to eliminate the deceased. He said that there was a stone and slipper at the door of the deceased. He said there was not type of light at the time of attack. He said he recognised the voice of A1 telling PW5 to shut up. He said he didn't tell Mr Muthuri that he recognized the voice of A1 telling his sister to shut up. He said when neighbours came he didn't also tell them he heard A1 tell his sister to shut up.

He said the Area Manager and 2 police officers came to scene at dawn. He said he told the Area Manager one Kenneth that he heard the voice of A1. He said the buckle which he identified in court came from deceased person's belt. He said that A1 used to live in their kitchen sometimes prior to the incident and it was only about 2 to 3 days that he was not at home prior to the incident. He confirmed he didn't tell

police he had been seeing A1 and A2 together. He said PW1 had a quarry but they had not been paid on the day of attack.

PW9 Evans Mose took photographs at scene. PW10 Dr. Mohammed Nur produced post-mortem Report conducted by Dr Kihumba whose opinion was that deceased died as a result of severe haemorrhage due to multiple cuts.

PW11 P. C. David Ng'ang'a testified that on 15.12.2015 he received a report of assault at Nkubu Police station but when victim arrived at Nkubu Mission Hospital she succumbed. That he was among officers who went to Ukumbo Village to conduct investigations. He said door to deceased house was broken using building blocks. The Investigation officer said that blood was littered all over the house and some stones used to break the door were inside the house. They interrogated deceased persons children PW5 and PW9 and the 2 said it is the screams from their mother which woke them up and they found doors to houses where they were sleeping were locked from outside. PW11 said that PW5 and PW9 recognized the voice of one of the attackers as that of A1. PW11 collected a blood stained petticoat and blood stained curtains from the house – Ex P4 and 5. PW11 also said that PW9 recovered a belt buckle at scene which he identified as that of A1-Exp1.

PW11 also said they established that A2 was co-wife to the deceased and that she had borrowed money from Ngugi which she wanted to hire killers for the deceased. It was on that account that accused persons were arrested and charged.

In cross examination the current Investigating officer said that officers who initially visited scene didn't record statements. He said that a soiled buckle was collected from scene and that PW9 –Erick indicated it belonged to A1 but didn't say the buckle was soiled. He said deceased person's husband was not injured in the attack. He said there was no report to police of bad blood between the deceased and the 2<sup>nd</sup> accused.

When accused persons were placed on the defence, A1 gave sworn statement and denied having conspired with A2 to kill his aunt the deceased. He said he

and the deceased stayed at Nkumbo village. He said from Nkumbo village to Kiamakoro is about 50 KM. He said he was in Kaguma between 14.12.2015 to 15.12.2015 at 6.00 am.

He said it was on 15.12.2015 at 10.00 am he received phone call from Edward Muthomi who told him about the incident that had happened at home and that his uncle and the wife fought the entire night. He said that he went home and found deceased persons house had blood stains.

He said he had not interacted much with PW1's children as he met them when they were very young. He said there were staying in a piece of land elsewhere and when it was sold PW1 moved to the current place. He said he had not put up his house. He said it was not true that Anne Wanja and Erick recognised his voice at scene on the material night at as he was not there. He said the buckled produced in court didn't come from his belt. He said he came to know A2 at the police station. He said he was arrested on 15.12.2015 at 11.00 am when one Mbithi who was in the crowd said he was among the attackers. He said the police officer who arrested him didn't testify. He said he used to see A2 at Mitunguu Market where she was a tailor.

He said he had no grudge with his uncle and cousins. He said the land between PW1 and his fathers land had a boundary and had no grudge with PW1.

A2 in her testimony said that she used to stay at Mitunguu 15 km from Nkumbo village where PW1 resided with the deceased. He said PW1 had not paid dowry for her. She said she started cohabiting with PW1 in 1992 and their 1<sup>st</sup> born was born in 2002. She said it was after the birth of their 1<sup>st</sup> born that she learnt PW1 had another wife. She said the deceased used to do business in Mitunguu and she could even give PW1 money to pay fees for her children schools fees whenever they were chased from school and she was not around. She said she didn't tell PW2 anything to do with the deceased as they had no problem. She said Tabitha was not known to her and she didn't share with her or anyone else her displeasure with the deceased. She denied that she used to pick quarrels with the deceased. She denied having fought with the deceased. She denied having borrowed money to hire killers for her co-wife. She said PW1 could go and borrow money to take PW5 and PW9 to school. She said on 14.12.2015 after leaving her place of work, she went to her house and didn't leave until the next day. She said PW1 had mentioned to her that his late brother had a son known as Restus Kithinji but she had not met A1 physically. She denied having conspired with A1 to kill the deceased.

The 2<sup>nd</sup> accused said Peris was not a tenant where she lived and none of her neighbours testified in court. She said that they used to support each other with the deceased and it was not true she had a problem with her. The accused persons counsel filed written submissions seeking to have accused persons acquitted.

From the evidence on record for the prosecution, this court is to determine whether the prosecution has proved its case beyond reasonable doubt satisfying the ingredients of the offence of murder as provided under S. 203 of the penal code to wit:-

1. Fact of death
2. Cause of Death
3. Whether cause of Death was as a result of an unlawful act and/or omission
4. Whether the unlawful act and for omission was actuated with malice aforethought.
5. Whether the unlawful act and/or omission actuated with malice aforethought was perpetrator by the accused persons.

It is not in dispute the deceased person died and died a very painful death considering as the witness said and the pathologist found that she suffered multiple deep cuts to the head and both upper limbs with partial amputation of the left forearm. The kind of injuries sustained could not have been accidental. They were intentional and aimed at causing either grievous harm or kill her and the attacker or attackers achieved their aim. They eliminated the deceased without any justifiable cause. Exp3 – Postmortem report filled by Dr Kihumba gives an opinion that cause of death was severe haemorrhage due to multiple sharp trauma force.

The only dispute for determination is whether accused persons committed the offence. PW1, PW5 and PW8 claim they heard and recognised the voice of A1 telling PW5 to shut up. They have given their words he allegedly used in their evidence in court as PW1 “ *Wacha nyamazeni*” PW1 said this was when attackers were leaving. PW1 didn’t tell police that he heard and recognized the voice of A1 but didn’t give the specific words. PW5 on the other hand said he heard and recognized A1 voice say : “*Nyamaza wewe.*”

Both PW1 and PW5 didn’t say in which language A1 uttered these words.

PW8 – Erick Munenen said he heard a familiar voice warn his sister to shut up. He said the voice said in Kimeru “ *Nyamaza, nyamaza kira.*”

The 3 have given the court 3 different versions of the words uttered by the alleged voice they recognized. PW1 and PW5 have not said in which language the words were uttered. When PW1 and PW8 went to the police station according to the Investigating officer they reported their mother had been attacked by unknown persons. It is questionable why they said unknown persons attacked their mother when they alleged to have recognised the voice of A1.

As defence counsel has submitted, none of the PW1, PW5 and PW8 told the neighbours that they had recognised the voice of A1 among the attackers.

PW1 said that A1 used to drink and start talking carelessly. Whereas PW5 said that PW1 used to get proceeds from the quarry and take to A2 and that at one time he had chased the deceased away and she only returned in 2013 at the insistence of her grandmother. PW1 claimed he lived well with the deceased and that his wives the deceased and A2 used to support each other. It is puzzling that PW1 who was together with the deceased in the house didn’t suffer any injuries at all when his wife was inflicted with multiple cuts that even resulted to an amputation of the left arm and PW1 doesn’t explain how he intervened as a man and husband to stop the injuries being inflicted. He was too casual about this death of his dear wife and there is a possibility he had a hand in it.

As regards A2 there is evidence from PW5 and PW8 as well as other witnesses that she was not living in harmony with the deceased and that one time she attacked the deceased but the evidence adduced against her in connection to the murder is that of PW2 Tabitha Kendi who said the deceased told her she feared she would die because of bad blood between her and A2 but the alleged threats were not reported to police and there is no corroboration she was told about the fear by the deceased.

There was evidence of PW3 Peris kairuthi who said the deceased used to tell her. A2 used to go to her home and fight her whenever PW1 went to home where she stayed. She said that she went to separate them whenever they fought and in 2014 it is her husband who separated them when A2 went with a panga to fight the deceased. The said husband did attend to corroborate this evidence but PW8 and PW5 confirmed the fight. However, it was shown how the court was to connect the fight in 2014 with the murder that happened at night in December 2015. That the fight was never reported to police and PW1 the husband of A2 and the deceased didn’t also take action.

PW4 claimed that A2 one day told her that there was a woman with who had made her husband not to pay fees for her children and when she learnt the witch A2 was talking about was the deceased she told the deceased as much. The deceased didn’t report that she was called a witch. What PW4 alleges she was told by A2 was not witnessed by anyone else.

PW6 said the deceased and A2 used to quarrel every time as they were married to one husband.

PW7 Jacinta Ngugi said A2 borrowed her 5000/= in 2015 to top up and hire 3 people to kill her co-wife and she told her she didn’t have the money and also discouraged her that it was a bad idea. She didn’t report to police what A2 allegedly said and she didn’t share with anyone. The evidence of PW2, PW3, PW4, PW5 and PW7 were not corroborated. What they claimed to have heard said by A2 was so serious that if it was true they ought to have reported even to the village elder but they didn’t until the worst happened.

The other evidence against A1 is in relation to a belt buckle which PW8 claims he identified as that of A1, but apart from there being no corroboration that buckle came from A1’s belt, there was no special mark given by PW8 that made him identify the buckle as having fallen from A1 belt. If further examination was conducted particularly DNA profiling probably it could have been identified that it belonged to A1 but no such examination was done. The accused persons denied having committed the offence and PW1, PW5 and PW8 confirm that for about 2 to 3 days A1 had not been at home. A1 said he was 50 KM away in Kaguma where he was working and only came home on learning of the misfortune that had be fallen his uncles family.

A2 was also confirmed to be living in Mitunguu and she said that she was in her house the entire night from 14.12.2015 to 15.12.2015 in the morning. The Investigating officer didn’t investigate where the 2 were on the night of murder.

This court finds that evidence before this court doesn’t meet the threshold of beyond all reasonable doubt and accused persons are acquitted under S. 322 CPC.

**HON A. ONG’INJO**

**JUDGE**

**RULING DELIVERED, DATED AND SIGNED IN COURT ON 20<sup>TH</sup> DAY OF JUNE 2019.**

**In the presence of :**

C/A: Kinoti

State : Ms Mbithe for state

Mrs Ntarangwi Advocate for accused persons – present

**Court:**

Copies of judgment to be supplied to defence and state counsel.

**HON A. ONG'INJO**

**JUDGE**