



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL CASE NO. 32 OF 2015

REPUBLIC.....PROSECUTION

VERSUS

DAVID KIMATHI KILUNGU.....ACCUSED

JUDGMENT

1. **DAVID KIMATHI KILIUNGU ALIAS CHROME** (“the Accused”) has been charged with the offence of murder contrary to Section 203 as read with section 204 of the Penal Code Cap 63 of the Laws of Kenya. The Particulars of the offence being that on 15th March 2015 at Gichane Village Kangeta Location in Igembe Central Sub-county within Meru County, the accused Murdered **CAROLINE GAKII WANJIKU**. He pleaded not guilty and the prosecution called seven witnesses to establish its case.

2. **PW1 SABRINA MUTUENE** who is the mother to the deceased herein told the court that on 15/3/2015 her daughter left to go to the home of PW2. On her way back she found the accused person had waylaid her at the gate. The accused person then stabbed the deceased with a sword on the left thigh. The deceased screamed and she rushed out with a torch and saw the accused person running away. When she rushed in response of the screams she chased the accused but he got away. She was able to identify him as she had a torch and there was moonlight outside. She went back to where the deceased had fallen. She called her husband and the accused father and got a vehicle to take the deceased to hospital but on arrival she was pronounced dead. The deceased was then taken to Maua Methodist Hospital Mortuary.

3. When the accused grandfather got old he called clan elders and told them that her husband should get ½ an acre from the accused person’s fathers land. Eventually her husband was given the land over ten years ago. This might have been the reason the accused person had a dispute with them. During the day the accused person roamed around swearing that he would kill someone that day. Even before he attacked the deceased he had held her husband by the collar but he was able to overpower him.

4. **PW2 TERESA NKATHA** recalled that on 15/3/2015 she was at her house with her two children when the deceased visited her. It was at 7.00 pm and she invited her to eat together with her family. Later she asked her to escort her and when they reached the gate she asked her to switch off her torch so that she could run to her house. a few seconds after switching off the torch she heard the deceased screaming “Teresia Nimekatwa”. However because she feared the person who had cut the deceased would come and cut her children she remained in her compound. The deceased mother later on went to ask her for some money so she could get a vehicle to transport the deceased to hospital. PW2 gave her Kshs. 600/= but the next day PW1 called her and informed her that the deceased had died.

5. **PW3 PETER KOBIA** recalled that on 15/3/2015 he was at home when he heard screaming in the evening. The deceased was the one screaming and when PW1 asked her who had cut her she said that it was the deceased. Later, the PW1 rushed to the canteen to look for a vehicle as he watched over the deceased. PW1 came with a car and borrowed money from PW2, other people then helped to get the deceased into the car but she was pronounced dead at arrival at the hospital.

6. **PW4 DR. SALESIOUS MURIUNGI** told the court that he graduated from the University of Nairobi in 1987 with a bachelor of Medicine and Surgery. On 19/3/2015 he conducted a post mortem on the body of the deceased herein. The history was that she had been stabbed on the thigh with a sharp object and she died on the spot. The body was pale meaning that the deceased had lost a lot of blood and there was a deep cut on the left thigh in the femoral area. The sharp object had severed blood vessels that supply the leg with blood. In his opinion therefore, the cause of death was a cardiac arrest due to severe hemorrhage from cut on the femoral artery by a sharp object.

7. **PW5 CPL MEME KANOTI** testified that on 15.3.2015 he was at the station when 3 men arrived and claimed that the man who killed his daughter was asleep in his house at Gichane village. In the company of David Rutere and APC Stephen Mwinzi rushed to the scene. The accused person refused to open the door when they called out and introduced themselves. They were forced to kick the door down. The accused had locked himself in one of the bedrooms and they were also forced to push that door open. They found the accused holding a dagger/sword which had blood stains. They managed to disarm him and escort him to the police station.

8. **PW6 CPL ROBERT CHESIRE** testified and told the court that on 15/3/2015 he was at the station around 10 pm when a group of people came to the station including Sarah Ncoro who is a member of community policing. He was in the company of PW1 and they reported that on the same day at around 8.00 pm their daughter, the deceased had been stabbed. They raised alarm and well-wishers came to assist them and the deceased was taken to a nearby health facility. On arrival at Maua Methodist Hospital she was pronounced dead. She had sustained a deep wound on her upper left leg.

9. The following day at around 4.00am they were called and told that the suspect had been arrested by the officers from Kinyanga AP post. He met AP meme at the station and he handed the suspect to him. Additionally he also handed over the dagger that had been recovered from the arrest. On 16/3/2015 PW6 visited the scene in the company of PW5 where there was a lot of blood and vomit. He took the blood sample from the scene. On 19/3/2015 a post mortem was conducted on the body of the deceased and a blood sample was taken and handed over to the government chemist.

10. **PW7 LAWRENCE KINYUA** a government analyst told the court that he has a masters in Environmental Science and a Bachelor's Degree in Bio Chemistry. On 9/4/2015 at the government lab in Nairobi items were received from PW6. Item Marked H1 was a knife with a black handle. Item Marked H2 were twigs in an envelope indicated from the scene. Item marked H3 was a blood sample of the deceased. They performed DNA profiling and the conclusion was the DNA profile from the knife H1 and the twigs H2 both matched the DNA profile of the deceased. He prepared a report dated 30/5/2017 and signed together with the DNA tabulation.

11. **DW1 DAVID KIMATHI** the accused person herein testified and told the court that on 15/3/2015 he was making a cow shed for his father. He worked up to 4.00 pm and then he went to his home in Kisasi. He watched football up to 11.00 pm in a bar near his home and then he proceeded home. At 4.00 am there was a knock on his door by the police who arrested him. The police were in the company of his father's brother known as Nchoro. The police officers informed him that he had killed an unknown person and later he found out that it was his cousin, the deceased herein.

12. **DW1** indicated that it was not true that the knife was recovered from his house.

13. I have carefully considered the evidence on record. The accused is facing a charge of murder. **Section 203 of the Penal Code** defines that offence as follows:-

“203. Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.”

14. Also in **Republic v Mohammed DadiKokane & 7 others [2014] eKLR**, the court held of murder that:-

“This definition gives rise to four (4) crucial ingredients of the offence of murder all four of which the prosecution must prove beyond a reasonable doubt in order to prove the charge. These are:-

1. The fact of the death of the deceased.

2. The cause of such death.

3. Proof that the deceased met his death as a result of an unlawful act or omission on the part of the accused persons, and lastly

4. Proof that the said unlawful act or omission was committed with malice aforethought.”

15. On the fact of death and the cause of death according to the post mortem report dated 19/3/2015 by PW4 the deceased death was confirmed and the conclusion was that the deceased died due to cardiac arrest due to severe hemorrhage from a cut of both left femoral artery and vein by a sharp object.

16. On the third issue, it must be proved beyond any reasonable doubt that the deceased met his death as a result of an unlawful act or omission on the part of the accused person. PW1 who is the mother to the deceased person testified that when the deceased raised alarm she ran outside and saw the accused person running away. She was able to identify him because she was carrying a torch and also because there was sufficient moonlight so she was able to see him clearly. PW1 also testified that when she heard the deceased screaming, the deceased said that Kimathi had cut her on the thigh. PW3 also testified that he heard the deceased crying and saying that the accused person was the one who had stabbed her. The evidence of PW1 and PW3 confirms that it is the accused who committed the unlawful act that led to the death of the deceased. A knife with a black handle was recovered from the accused person's house by PW6 Corporal Robert Chesire. The knife had blood stains which upon analysis by PW7 Lawrence Kinyua Muthuri, the DNA profile generated therefrom matched the DNA profile that was generated from the blood sample taken from the deceased person as indicated in exhibit P6 Government Analyst report.

17. The accused person's defence that he was watching football in a bar near his home upto 11 pm has not been supported by any other evidence and the evidence of the prosecution witnesses is overwhelming that he is the one who committed the unlawful act that led to the death of the deceased. The accused person ought to have raised his defence of alibi either at the time of his arrest and during investigation or even in his cross examination of the prosecution witnesses. This court finds that this defence is an afterthought and a part from being a mere defence it has also been challenged by the prosecution evidence and cannot therefore be regarded by this court.

18. Whether the unlawful act was actuated with malice aforethought this court finds that the conduct of the accused in waylaying the deceased in darkness and stabbing her on sensitive part of the body was meant to cause grievous harm or the death of the deceased person. PW1 testified to the fact that there had been a land dispute between their family and the family of the accused. The accused did not deny the

fact that he had a quarrel with PW1 husband during the day where he caught him by the collar. Moreover, the accused herein used a sharp dagger/sword to stab the deceased herein and he must have known that the use of such force would have caused the deceased grievous harm or her death. In **Daniel Muthee v R. CA No. 218 of 2005 (UR)**, while considering what constitutes malice aforethought, the Court of Appeal observed as follows:

“When the appellant set upon the deceased and cut her with a panga several times and then proceeded to cut the young Allan in a similar manner, he must have known that the act of cutting the deceased persons on the head with a sharp instrument would cause death or grievous harm to the victims. We are therefore satisfied that malice aforethought was established in terms of Section 206 (b) of the Penal Code”.

19. In the circumstances, this court finds that the accused person is guilty of the offence of murder of **CAROLINE GAKII WANJIKU** and he is consequently convicted under **Section 322 of the Criminal Procedure Code**.

HON A.ONG’INJO

JUDGE

JUDGEMENT DELIVERED, DATED AND SIGNED THIS 31ST DAY OF OCTOBER 2019

In the presence of:-

CA: Kinoti

State: Ms Mbithe

Mr Nyenyire advocate for accused

Accused: Present in prison

Ms Mbithe:

I request for time to establish if accused has past records.

Order:

Mention 21.11.2019 for Records mitigation and victim Impact statement.

HON A.ONG’INJO

JUDGE