



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MERU**

**CRIMINAL CASE NO. 26 OF 2013**

**REPUBLIC.....PROSECUTION**

**VS**

**ANDREW GIKUNDI KIRINYA ALIAS KIJIRI.....ACCUSED**

**JUDGMENT**

The accused Andrew Gikundi Kirinya alias Kijiri was charged with the offence of murder contrary to section 203 as read with section 204 of the penal code.

The particulars are that Andrew Gikundi kirinya alias Kijiri on the night of 7<sup>th</sup> March at Ruiiri market, Ruiiri Location in Buuri District within Meru county murdered Henry Mwitii.

PW2 testified that when she went to open the gate to Decent lodge where she was working as caretaker for a customer who had booked a room when he saw accused person herein beating someone who was lying on the ground. That a lady who was in accompany of the customer he was opening for told the accused not to beat someone who was drunk and that he should instead take him home. That the customer and his companion entered the lodge and PW2 locked the gate. That the next day at 7.50 am she heard people outside asking who is it that got drunk and slept outside. She went and found the person the accused was beating had died.

PW2 said there was security light and she saw the accused very well kicking and beating the deceased. She said she knew the accused as a customer and has nick name Kijiri.

PW3 P.C. Dickson and Mugambi investigated the offence and preferred charge against the accused. However P.C Mugambi got transferred to J.K.I.A.

PW4 Dr James Kisilu produced post mortem Report in respect of the deceased which was conducted by Dr. Njuguna at Meru TRH. Dr Njuguna established cause of death as massive haemorrhage due to rupture of spleen following blunt trauma. There were bruises on abdominal wall of the deceased. When the accused was placed on defence, he gave sworn statement and said that he left the deceased at the club and went home in company of Nahashon and he left the deceased at the club. He said he didn't leave his house again on the material night until the following day when Nahashon DW2, a murder suspect in CR.C.63 of 2018 who testified one day after accused herein had testified woke him up so they could allegedly go and look for a mechanic. Accused denied having seen PW2 at the scene on the 7.3.2013 when they were at the club. Accused says she saw Linda –PW2 on 8.3.2013 in the morning when they saw a crowd of people and he found his cousin had died he said he didn't see any injuries on the deceased who was lying on his side. Accused said that since the chief was at scene he left with Nahashon to go and look for a mechanic. Accused said he was arrested later at 6.00 pm by police from Kiirua Police Station and on interrogation he told police everything. He said he was fabricated simply because he said he had been with accused at the club. Accused confirmed there was security light at the scene and many people had booked at the guest house.

Accused said in his evidence in chief that when they left the house they passed through a spirit and wines shop and took Napoleon for the hangover, but in cross examination he says he took Furaha while he could not remember what Nahashon took. He said he stayed at home with his parents, sister, brother and even wife Kawira. He confirmed the deceased died in front of the bar where Frida – PW2 worked.

DW2 – Nahashon testified saying he was with the accused on the material night and he spent the night in his house. That he woke up accused so that they could go and look for a mechanic and when they got to Ruiiri market there was a crowd and on approaching he heard accused exclaim "nani ameuu kuzo yangu" he said he saw the dead person was the same one who had been with them at the bar the previous day. That because chief was at scene he requested accused to go and get him a mechanic. That after they got mechanic accused went to Ruiiri Catholic where he was operating a mixer. DW2 said when they left the bar on 7.3.2013 the accused remained there. That while at the bar, accused bought him some spirit but he could not remember the brand. DW2 said he knew accused as driver while he was conductor in Mutembei's matatu. He said drier to Mutembei's vehicle was Peter Kimathi. He said he didn't know name of the PWs where they were. He could not remember the brand of beer which accused was taking. He said that he slept in accused persons house and if he woke up at night he would have known. DW2 said he didn't know PW2.

The prosecution and defence filed submissions seeking that accused be convicted and defence seeking that accused person be acquitted for reasons that his defence of alibi had not been challenged and that it had not been proved beyond all reasonable doubt that accused had a grudge against his cousin the deceased herein. As submitted the issues to be determined are

1. Fact of death
2. Whether death cause by an unlawful act and/or omission
3. That the unlawful act and/or omission was actuated by malice aforethought.

It is not disputed the deceased died. PW2 said he saw the deceased being beaten the previous night by the accused outside Decent lodge and the following morning he was found dead. Accused confirmed he was at the bar on 7.3.2013 with deceased but left him at the bar and on 8.3.2013 when he was going to look for mechanic with DW2 he found his cousin had died outside the bar/lodge. Post mortem report filled by Njuguna and produced by Dr Kisilu confirmed the death and issued certificate no. 284692 in which it was established cause of death was haemorrhage due to spleen rupture following blunt trauma. The accused was said by PW2 to have been seen beating and kicking the deceased on the night of 7.3.2013 and that a lady who had accompanied a customer to the Decent Guest house told accused to stop beating a drunk person. Accused claims he didn't see PW2 at the bar but confirms she works at the lodge where deceased persons body was found outside.

He said that he didn't commit the offence and that he was with DW2 on the material night. All along accused person didn't raise the defence of alibi to the police on arrest or even to the court during plea or even to the prosecution witnesses during cross examination. The deceased was accused persons cousin and when he found his cousin lying dead in the morning and he was not involved in his death, it is unbelievable that instead of taking word home he decides to go on with his plans to look for a mechanic for a 3<sup>rd</sup> party. If it is true then that would be very insensitive of him.

Whereas DW2 says accused was a driver and he was turnboy when they knew each other, accused person only says DW2 told him to look for a vehicle to take his passengers home without saying whether he knew him as a driver or as a turnboy or conductor. If DW2 was with owner of the matatu who was the driver and they had been plying same route the question is why would they look for accused who was working at the Ruiru catholic church as mixer machine operator to look for a mechanic? Accused could not even tell the make of the matatu or even its registration particulars. The evidence of accused was not but consistent with that of DW2 on their movement from accused persons house on 8.3.2013 whereas accused said they passed through wines and spirits to take some alcohol to remove hangover, DW2 didn't allude to such. He said when they arrived at Ruiru market they saw a crowd and on approaching they found accused persons cousin lying dead and he identified him as the person they were with. DW2 didn't even know the name of the bar where the alleged they were with accused and the deceased. He could not remember the kind of bear accused was taking. He said he was taking Napoleon.

Although the prosecution always bears the burden of proof in any criminal prosecution and therefore disproving the defence of alibi as was held in the case of **SSentale Vs Uganda [1968] EA 36 and Wangombe vs Republic (1976-80) KLR 1683**, however the accused was required to raise it at the earliest opportunity to enable the prosecution to interrogate it and determine its veracity.

In the case of *R. V. Sukha S/o Wazir Singh & Others (1939)6 EACA 14* it was held that if defence of alibi is not raised at the earliest opportunity to enable the prosecution to check it out to determine its veracity until months afterwards there is naturally a doubt as to whether he has not been preparing it in the interval and secondly if he brings it forward at the earliest possible moment, it will give the prosecution an opportunity of inquiring into it and if they are satisfied as to its genuineness proceedings will be stopped.

The accused person herein is raising the defence of alibi 5 years 6 months and 11 days later. All along he never mentioned he had a witness to his defence and it was only on 24.9.2018 that he said he had a witness who was a remand prisoner. It is the belief of this court that if DW2 is the witness that accused intended to call and he knew he was a remand person he would have applied for a production order for him so he could have testified the same day as himself.

There are high possibilities that after he testified accused went back to remand to coach DW2 on what to come and say and the result is the contradictions and inconsistencies that this court has pointed out between evidence of accuse and his alleged witness.

In any case PW2 is a direct witness who saw accused at the scene. She saw him beating and kicking the deceased and his intention could not have been good considering he even ignored the person who was telling him to stop beating a drunk man and instead take him home.

This court finds that accused persons defence cannot stand. He is the one who kicked and beat the deceased resulting into the rupture of his spleen and therefore bled to death. This court finds accused person guilty as charged and he is convicted under S.215 C.P.C

**HON. A. ONG'INJO**

**JUDGE**

**25.10.2018**

**Before Adwera J**

**Penina – Court Assistant**

**Mrs Mwathi for state.**

**Mr Kiogora Arithi Advocate for accused.**

**Accused – present in person**

**Court**

**JUDGEMENT DELIVERED, DATED AND SIGNED IN COURT**

**HON. A. ONG'INJO**

**JUDGE**

**Mrs Mwathi**

I don't have any records for accused. He may be treated as 1<sup>st</sup> offender.

**Accused Mitigation by Mr Kiogora**

I have instructions to apply for a certified copy of proceedings and judgments.

**Order.**

Mention 8.11.2018 for victim Impact statement and sentencing. Defence to be supplied with typed proceedings and judgment.

**HON. A. ONG'INJO**

**JUDGE**