



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT KISUMU**

**HCCRC NO. 19 OF 2014**

**REPUBLIC..... PROSECUTOR**

**VERSUS**

**J O O.....ACCUSED**

**JUDGMENT**

The accused is charged with Murder Contrary to Section 204 of the Penal Code.

The particulars are that on 24th February 2014 at Kaila Sub-location in Kisumu West District within Kisumu County he murdered C A.

He pleaded not guilty to the charge. At the trial the prosecution called eight witnesses.

Briefly the prosecution's case is that on the material day at about 5.50AM the deceased left her home to go to school but along the way was attacked by a person who cut her on the head with a panga. She died almost instantly. According to a post mortem conducted at the Jaramogi Oginga Odinga Teaching and Referral Hospital on 6th March 2014 the cause of her death was partial decapitation of the head and resultant hypolemic shock due to bleeding.

The star witnesses M O (PW1) and M A (PW3) testified that they too were headed to school at about the same time on that day. M (PW1) was walking behind C – the deceased – while M (PW3) was walking ahead of her. According to M 9PW1) then a student at [particulars withheld]School, a person called Joseph passed him in a hurry and before long he heard a scream ahead of him. On paying closer attention he saw J cutting C with a panga. It was at that juncture that he and some other students he was walking with hurried to the scene. They found C lying in a pool of blood. He testified that he positively identified J as he knew him as they were not just classmates but also village mates.

On her part M A (PW3) told the Court that she saw C walking behind her with a boy; they were about thirty meters behind her and it was dark as it had not dawned fully. Suddenly she heard C screaming. She testified that she knew it was C because they were classmates and knew her voice. She started walking back to where C was and that is when she saw the boy fleeing with a panga in his hand. She did not however identify the boy as she did not know him. At the scene she found M (PW1). C was on the ground and was bleeding profusely on the neck. A “boda boda” - motorcycle taxi operator came to take her to hospital but found she was dead. M (PW3) went to school and reported the matter to her teacher who called the school principal who upon going to the scene and confirming the incident and identifying Christine called the police. The body was then removed to the Jaramogi Oginga Odinga Teaching and Referral Hospital Mortuary by officers from Kombewa Police Station where the matter was reported.

When news reached Peter Nyawara Gumba (PW4) the Assistant Chief for Kit Mikayi Sub-location, East Seme Location, he mounted a search for the assailant. This was after getting information pertaining to him at a baraza convened by the Chief of East Seme Location. He traced him to a relative's place two days later, apprehended him and took him to Kombewa Police Station. Evidence was led that the accused had gone to his aunt's place at Kombewa at about 6AM on the material day and said he had just taken a patient to Kombewa Hospital. G A (PW5) who clarified that she was not the accused's aunt but his godmother testified that she did not find this unusual although he had never visited her before. He stayed there and was even visited by his mother but was later apprehended by the Assistant Chief. The accused is alleged to have led Chief Inspector Edward Isanga (PW7) of Kombewa Police Station who is the Investigating Officer in this case to the place where the panga, exhibited and identified as the murder weapon, was recovered.

The accused told this Court that prior to his incarceration he worked as a mechanic in Nakuru but hails from Seme in Kaila Sub-location. He testified that on that fateful day as him and his mother were preparing to go to the shamba at about 8AM they heard that his girlfriend of four years, C A, had been killed on her way to school. Later at 2PM they heard her body had been taken to the mortuary. He admitted going to his godmother's (PW5) home on that day but denied that he did so to hide. He also admitted that that is where Assistant Chief Gumba (PW4) found him. In regard to the evidence of M O (PW1) and M A (PW3), while admitting he knew PW1 he stated that their evidence did not point to him as he is not known as J alias T. He took issue with the fact that the witnesses were not called to identify him when he was arrested. He also denied threatening to do the unspeakable as narrated by E A (PW4) and also vehemently denied that he led to the recovery of the panga identified by the witnesses as the murder weapon. He tendered the police investigation's diary as proof that he did not leave the cells to take police officers to recover the panga (EXB.D1). He reiterated that he did not kill C.

In summing up Mr. K'Opot, Advocate, for the accused reiterated his submissions that the prosecution has not proved its case beyond reasonable doubt. Mr. K'Opot stated that the evidence against the accused was grossly circumstantial the only link between the accused and the case being that he was the deceased's boyfriend and that E (PW2) did not approve of the relationship. He wondered what could have motivated the accused to commit the offence yet the relationship was cosy to the end. He contended that the onus was on the prosecution to remove that doubt.

Regarding the identity of the assailant Mr. K'Opot submitted that it is doubtful; That whereas M (PW1) claims to have seen Toto also called Joseph his evidence of recognition was not tested through an identification parade. Mr. K'Opot submitted that this left the Court with dock identification which is unreliable as PW1 did not say that the accused is that T that he saw at the scene or even say where the said Toto lives.

As for the murder weapon Mr. K'Opot submitted that the evidence led on it was also shaky and that although the same is akin to a confession no warning or a statement by the accused was exhibited. He also took issue with the evidence of Assistant Chief Gumba (PW4) who he accused of starting the story that the assailant was the accused in this case. He urged this Court to acquit the accused.

On his part Prosecution Counsel submitted that this was a case of love gone sour. Mr. Muia submitted that the accused could not fathom his life without C and so he killed her. He drew the Court's attention to the fact that the accused in his testimony began the day at 8 O'clock. He submitted that the deceased's day begun earlier as she was a student. He speculated that if at all the accused would meet the deceased it would have been earlier than 8AM. Referring to the evidence of the prosecution witnesses he submitted that M O (PW3) had seen the accused cut the deceased while M O (PW1) had seen him walking hurriedly. Mr. Muia submitted that these witnesses corroborated each others evidence even though neither had a relationship with the other. He submitted that their evidence was further corroborated by E (PW2) and contended that identification was not an issue as the four witnesses knew the accused. He urged this Court to find that the prosecution had proved its case beyond reasonable doubt and convict the accused.

In reply Mr. K'Opot urged this Court to take a closer look at the evidence of the witnesses. He reiterated

that the prosecution had totally failed to prove its case.

Evidence in the postmortem report is that the deceased suffered a partial decapitation of the head with a deep cut wound approximately 10cm long extending from the back of the neck through the left aspect of the neck. It is opined that the cause of death is partial decapitation and resultant hypovolemic shock due to hemorrhage. It is my find that this is consistent with the testimonies of M O (PW1) and M A (PW3) that the deceased was assailed and cut on the neck with a panga. Whereas M O (PW1) stated that he identified the assailant M (PW3) was categorical that she did not. She told this Court that even though she had seen the assailant fleeing she did not identify him as she did not know him. Mr. K'Opot's submission that M O (PW1) did not point to the accused as the person he saw assaulting the deceased on the material day is correct. It is not correct as submitted by the Prosecution Counsel that at the trial any of the witnesses directly pointed to the accused as the person they saw killing the deceased. M O (PW1) said he identified Joseph but was not asked whether that J was the accused in the dock. M A (PW3) said she saw the assailant but did not identify him since she did not know him before. She was not however asked whether the person she saw was the accused in the dock.

Be that as it may I am satisfied that there is evidence linking the accused to this offence. I am satisfied that not only did he cause the death of the deceased by an unlawful act but that he did it of malice aforethought. E O (PW2) testified that the deceased who was her sister was the girlfriend of the accused person. A few days prior to this heinous crime the accused had allegedly threatened to do the unspeakable if he was not reconciled to the deceased. The accused admitted he was in a relationship with the deceased but stated that the same was cosy to the end. In the same breath he testified that on the morning she was killed he heard about it but still went to the shamba with his mother. His conduct betrays him and is what links him to the crime. That link is to be found first in evidence of his fleeing from the area.

Whereas he alleges to have been home at 8 O'clock and later when the deceased's body was taken away by the police there is evidence from his godmother (PW5) that he went to her home at about 6AM on that day. He therefore lied when he said he was at home at 8AM. His visit to PW5's house was also curious and was no ordinary visit at all. Much as she was his godmother he had never visited her and it was not true that he had gone there after taking a patient to Kombewa Hospital. He stayed in her house that day and the next day when he was apprehended by Assistant Chief Ngumba (PW4). The offence was committed at 6AM and by 8AM he was at his godmother's house which he had never visited. It is more than obvious that the reason he visited his godmother was to hide. The accused had been named as the suspect in a baraza called by his area Chief who had called upon the Assistant Chief to look for him. PW4's evidence of how he tracked down the accused is corroborated by the accused's own godmother. PW4 confirmed that the accused is the suspect he was looking for and the person he helped bring to book. This being the case it was proved beyond reasonable doubt that the accused was the boy who fled from the area upon committing of this offence. It also confirms that he is the J that M O (PW1) identified at the scene.

The second thing that connects the accused to this offence is the panga. I am satisfied that although it was not documented, the accused person led Chief Inspector Isanga (PW7) to the place that the panga was recovered. PW7 is an independent witness who had no reason to lie against the accused person. I found his evidence credible and reliable. It was also corroborated by Assistant Chief Gumba (PW4) who although he did not accompany them was present when they left to go for the panga. The panga was positively identified by M O (PW1) and M A (PW3) as the murder weapon. The police ought to have taken an inventory of this but that they did not do so is in my finding not fatal. This was not a confession and a caution was not necessary.

I find that the accused's conduct – his own alleged indifference upon learning of his girlfriend's death and also his fleeing from the area, together with E's (PW2) evidence that the accused had just a few days before threatened to do the unspeakable if he did not reconcile with the deceased and his leading the police to the murder weapon provide proof that the accused is the person who killed the deceased.

Having considered the evidence as a whole I am left in doubt that this murder was premeditated. Just a

few days before the accused had threatened to do something terrible to the deceased and on the material day he armed himself with a panga and attacked her while she went to school. The manner in which he attacked her and the resultant injury he inflicted leaves no doubt that the accused had formed an intention to kill the deceased. I am therefore satisfied that malice aforethought has been established beyond reasonable doubt. In the premises I find the accused guilty of murder contrary to section 203 as read with section 204 of the Penal Code and convict him accordingly.

**Signed, dated and delivered at Kisumu this 30th day of May 2017**

**E. N. MAINA**

**JUDGE**

**In the presence of:-**

Mr. Muia for the State

Mr. Bagada for the Accused

Court Assistant – Serah Sidera

Accused person

INTERPRETATION: English/Swahili

MR. BAGADA: Accused person is a first offender. He is remorseful and is sole breadwinner of his family. He prays for leniency.

**E. N. MAINA**

**JUDGE**

MR. MUIA: I do not have his records.

**E. N. MAINA**

**JUDGE**

COURT: The Court has heard the plea in mitigation. However there is only one sentence for this offence, as of now. Accordingly this Court sentences the accused person to death. Right of Appeal is explained.

**E. N. MAINA**

**JUDGE**

**30/5/2017**