



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MIGORI**

**CRIMINAL CASE NO. 26 OF 2015**

**REPUBLIC..... PROSECUTOR**

**-VERSUS-**

**1. JACOB CHACHA MWITA**

**2. PETER MWITA CHACHA.....ACCUSED**

**JUDGMENT**

1. **GATI CATHERINE MWITA** (hereinafter referred to as '**the deceased**') was found dead in the morning of 08/07/2015 inside her house in Nyamagenga village in Kuria East District within Migori County. The incident was reported at Ntitaru Police Station and upon conclusion of investigations the two accused persons herein were charged with the murder of the deceased. They denied the charge and the case was set for hearing.

2. Five witnesses testified in support of the information facing the accused persons. **GEOFFREY CHACHA**, a minor aged 12 years old testified as **PW1**. **SUSAN GATI MARWA** testified as **PW2**. **Dr. RUWA SAMMY MWATELA** testified as **PW3**. The investigating officer **No. 235588 Insp. EPHANTUS MBURU** testified as **PW4** whereas **EVERLYN ROBI JOHN** aged 16 years old testified as **PW5**. For the purposes of this judgment I will refer to the said witnesses according to the sequence in numbers in which they testified. **PW2** was the mother to **PW1** and **PW5** while **PW2's** husband was a brother to the husband of the deceased as well as the accused persons. The accused persons are therefore brothers and also in-laws to **PW2**. They are uncles to **PW1** and **PW5**.

3. The prosecution's case is that in the night of 07/07/2015 as **PW2** was in her kitchen she heard two people just nearby her homestead saying that they were going to kill someone that night. **PW2** recognized the voices as those of the accused persons whom she knew well. The accused persons went towards the house of the deceased which was about 5 metres from where **PW2's** house was but was separated by a wooden fence. Shortly she heard a bang on the house of the deceased. **PW2** rushed inside her house and attempted to wake up her husband in vain. **PW2's** husband was heavily-drunk that day and had slept a couple of hours ago. As **PW2** was so frightened she did not do anything but remained inside her house until the following morning. She then went to the house of the deceased to check what had happened to her. **PW2** was surprised to see the deceased lying on the floor with a rope tied around her neck. She raised alarm and people gathered. **PW2** later on recorded her statement with the police when the police went to collect the body of the deceased.

3. **PW1** and **PW5** were still outside the house they slept in when they saw the accused persons outside the house of the deceased. **PW1** and **PW5** were washing their clothes. They had hanged a lantern lamp on a wooden tree which formed part of the fence that separated their homestead from the house of the deceased. They were about 5 metres away from the house of the deceased. **PW1** and **PW5** reiterated how they saw the accused persons getting hold of the deceased who had gone outside her house to answer a call of nature. As the second accused person, **PETER MWITA CHACHA**, held the mouth of the deceased and covered it with a piece of cloth, the first accused person, **JACOB CHACHA MWITA**, used a panga to cut a rope which the deceased used to dry clothes on. They then severally tied the rope around the neck of the deceased and each of the accused persons pulled on the opposite directions away from the deceased.

4. While the accused persons were dragging the deceased into her house, **PW1** asked the accused persons what they were doing and the accused persons threatened **PW1** and **PW5** with likewise consequences if they ever disclosed what they had witnessed. The accused persons then told them that they will do what they wanted to do to the deceased and that no one could stop them, Fearing for their lives, **PW1** and **PW5** entered inside the house they slept in and did not come out that night. In the morning **PW1** and **PW5** prepared themselves and went to Nyamagenga Primary School. They did not disclose what they had witnessed the night before to anyone.

5. At around 02:00pm, **PW1** and **PW5** were informed that the deceased was dead and the school released them. They walked home and truly confirmed that the deceased was dead. They saw the rope still tied around her neck. They also witnessed the police who were then at the house of the deceased photograph the body of the deceased before they collected and left with it. Still traumatized, **PW1** and **PW5** kept to

themselves until when the accused persons had been arrested during the burial of the deceased on 15/07/2015 that is when they told their father what they had witnessed in the night of 07/07/2015. PW1 and PW5 were led to the police where they recorded statements.

6. PW4 had in the morning of 08/07/2015 received a report on the death of the deceased at the Ntitaru Police Station from one **John Mwita** (not a witness). It was reported that the deceased had committed suicide inside her house. PW4 while in the company of his colleagues proceeded to the scene. He found the body of the deceased lying on the floor of a grass-thatched house with a rope wrapped around the neck. He carefully observed the body and the scene and did not see any visible injuries. He also did not see any disturbances either on the roof or inside the house. He prepared a sketch plan of the homestead which he produced in evidence. From the observations at the scene, PW4 was not convinced that the deceased had committed suicide. He however took photographs of the body and the scene and escorted the body to Migori County Referral Hospital Mortuary for preservation and post-mortem examination.

7. As PW4 continued with investigations, he recorded statements from various witnesses and on 14/07/2015 accompanied the family members of the deceased to Migori County Referral Hospital Mortuary where he witnessed the post mortem examination on the body of the deceased conducted by a Dr. Ndege. The body was identified by **Hassan Masiaga Marwa** and **John Mwita**. PW4 also witnessed Dr. Ndege fill in the Post Mortem Report which he signed in his presence and he collected it. It was dated 14/07/2015. Dr. Ndege also observed the body and noted a tight rope wound eight times around the neck. There were no any injuries on the entire body. When Dr. Ndege removed the rope he noted strangulation marks around the neck annularly and opined that the cause of death of the deceased was strangulation causing severe asphyxiation leading to acute respiratory arrest. The Post Mortem Report was produced in evidence by PW3 on behalf of Dr. Ndege who had proceeded for further studies out of the country.

8. The deceased was laid to rest on 15/07/2015 and on which day the accused persons were arrested by the mourners as prime suspects and handed over to the police. On completion of the investigations, PW4 preferred the charges against the accused persons. PW4 also produced the photographs and the rope as exhibits.

9. At the close of the prosecution's case, the accused persons were placed on their defences and they both opted to give sworn testimonies without calling any witnesses. However, before the accused persons tendered their defences the Defence Counsel successfully applied for this Court to visit the scene of crime. That happened on 09/05/2017 where PW1 was recalled at the scene and proceedings were taken accordingly.

10. On his part, the first accused person denied committing the offence. He narrated that on the day the deceased was found dead he had woken up early and proceeded to work at Maeta town until around 10:00am when he was asked about the screams which came from their homestead. He managed to call someone whom he expected to be at their home and learnt that the deceased had hanged herself. He rushed home and confirmed so. He witnessed the police collect the body of the deceased and took part in the burial preparations until his arrest on the burial day on suspicion that he was involved with the death of the deceased. The first accused person also indicated that he had been arrested with the second accused person and one of his other brother who was later on released. That brother was the husband to PW2 and the father of PW1 and PW5. He contended that his said brother framed him through his wife and their two children. He however confirmed that he had not differed with PW1 and PW5.

11. The second accused person also denied taking any part in the death of the deceased. He also reiterated that on the day the deceased was found dead he had woken up early and proceeded to look for work until around 10:00am when he heard screams which came from their homestead. He managed to call his brother and learnt that the deceased had died inside her house. He rushed home and confirmed so. He accompanied his other brother to Ntitaru Police Station where they made a report and witnessed the body of the deceased collected by the police later. He took part in the burial preparations until his arrest on the burial day on suspicion that he was also involved with the death of the deceased. He also stated that he was arrested with the first accused person and his other brother who was later on released.

12. At the close of the defence case the matter was left for judgment.

13. From the above evidence, this Court is now called to find if the ingredients of the offence of murder have been proved in this case. The offence of murder carries three ingredients which are: -

**(a) Proof of the fact and the cause of death of the deceased;**

**(b) Proof that the death of the deceased was the direct consequence of an unlawful act or omission on the part of the Accused which constitutes the 'actus reus' of the offence;**

**(c) Proof that the said unlawful act or omission was committed with malice afterthought which constitutes the 'mens rea' of the offence.**

I will consider each ingredient separately.

**(a) Proof of the fact and the cause of death of the deceased: -**

14. There is no doubt that the deceased died. That was attested to by all the witnesses. The first limb is hence answered in the affirmative.

15. As to the cause of the death of the deceased, PW3 produced a Post Mortem Report which was filled in by Dr. Ndege after conducting the autopsy. The report opined that the possible cause of the death of the deceased was strangulation that led to acute respiratory arrest. Since there is no contrary evidence to that end this Court concurs with that medical finding. The other limb is likewise answered in the affirmative.

**(b) Proof that the death of the deceased was the direct consequence of an unlawful act or omission on the part of the accused**

**persons: -**

16. The accused persons denied taking part in the death of the deceased. The evidence pointing to the accused persons was by PW1, PW2 and PW5. PW2 stated that she heard the accused persons talking as they approached her homestead and proceeded to the house of the deceased. They said that they were going to kill someone that night. PW2 readily recognized the voices of the accused persons whom she knew well as her in-laws. She then heard a bang on the house of the deceased and attempted to wake up her drunk husband in vain. She slept until the following morning when she went and confirmed the death of the deceased and raised alarm.

17. The evidence of PW2 was corroborated by that of PW1 and PW5. Both PW1 and PW5 narrated the events as they unveiled that night. They not only witnessed what happened to the deceased but as well talked to the attackers whom they also knew very well as their uncles. When the Court visited the scene, it confirmed that the descriptions of the homestead and distances given by PW1, PW2 and PW5 were correct. The Court also saw the place where the lantern lamp had been placed as well as the fence and how far it was from where the deceased was attacked. It was such a short distance of around 5 metres at most. PW1 and PW5 were aided by the lantern lamp as they were washing their clothes that night. They both described the lamp as the ordinary lantern lamp which uses kerosene. From where the lamp was one could easily see what happened outside the house of the deceased even through the wooden fence which had ample spaces in-between.

18. The attackers talked to PW1 and PW5. PW1 asked the two attackers what they were doing to the deceased. The response was that PW1 and PW5 were to keep off the issue and that they were proceeding on doing what they wanted to do. PW1 and PW5 were indeed threatened with likewise consequences in the event they reveal anything they had witnessed. They then rushed inside their house and spent. They kept quiet until when they knew that the suspects had been arrested that is when they disclosed the events in issue to their father.

19. The evidence of PW1 and PW5 was also corroborated by that of PW3 and PW4. PW3 took the Court through the Post Mortem Report where the Doctor who conducted the post mortem examination confirmed that the rope had been wound eight times around the neck of the deceased and that the deceased had instead been strangled. PW4 found the deceased inside her house. She was lying on the floor and not hanging from any height. There was no disturbance in the house at all. That confirmed what PW1 and PW5 stated that the attackers upon tying the deceased around the neck with the rope pulled it on the opposite directions and then dragged the deceased into her house.

20. That being the evidence of the prosecution witnesses, the same must be weighed against the defences of the accused persons. They both denied being the attackers and that they learnt of the death of the deceased just like the others in their family. The first accused person raised the issue of being framed by the father to PW1 and PW5 who is also the husband to PW2. The first accused person stated that the accused persons were arrested together with the father to PW1 and PW5. PW4 stated that only the accused persons were arrested by the villagers and handed over to the police. Likewise, PW1, PW2 and PW5 did not state that the accused persons were arrested alongside a third person. Without shifting the burden of proof, suffice to say that the issue of how many people were arrested by the members of public relating to the death of the deceased was not raised during the prosecution's case. Neither did the first accused person expound on why the father to PW1 and PW5 would fix him up to enable this Court to weigh such evidence against the prosecution's evidence.

21. Behind the foregone background, this Court is under a legal duty to weigh the evidence of the prosecution and the defence with such greatest care and to satisfy itself that in all circumstances, it is safe to act on the evidence on recognition. This is premised on the settled principle in law that evidence of visual identification/recognition in criminal cases can cause miscarriage of justice if not carefully tested. The Court of Appeal in the case of **Wamunga Vs Republic (1989) KLR 426** stated as under: -

**“It is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of conviction.”**

It was also held in **Nzaro vs Republic (1991) KAR 212** and **Kiarie vs Republic (1984) KLR 739** by the Court of Appeal that evidence of identification/recognition at night must be absolutely watertight to justify conviction.

22. In **R -vs- Turnbull & Others (1973) 3 ALL ER 549**, which decision has been generally accepted and greatly used in our judicial system, the Court considered the factors that ought to be considered when the only evidence turns on identification by a single witness. The Court said:

**“... The Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have with the Accused under observation? At what distance? In what light? Was the observation impeded in any way....? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? how long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance?.... Recognition may be more reliable than identification of a stranger but even when the witness is purporting to reorganize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.”**

23. The above does not mean that there cannot be safe recognition even at night. The Court of Appeal in **Douglas Muthanwa Ntoribi vs Republic (2014) eKLR** in upholding the evidence of recognition at night held as follows:-

**“On the issue of recognition, the learned Judge evaluated the evidence on record and emphasized that PW1 testified:-**

**“I flashed my torch and I saw the accused he was 2 meters away from me. That the appellant was not only seen, but was positively**

and correctly identified or recognized by PW1, the complainant.”

**The Learned Judge further noted that the complainant testified he used to see the appellant in town. It is our considered view that from the evidence on record, the identification of the appellant based on recognition was free from error...”**

24. Again the Court of Appeal in **Criminal Appeal No. 274 and 275 of 2009 at Eldoret in Peter Okee Omukaga & Another vs R (unreported)** had this to say on the evidence of recognition at night:-

**“We have re-examined the evidence upon which that conclusion was made, and we find that it was well founded. We have no doubt whatsoever that Francis, John and Rose were familiar with the appellants; that Francis and John had known them by appearance as ‘neighbours from the village’, that they had played football with them long time ago, and that their voices were so familiar to them. Accordingly, we have no reason to disturb that finding and we dismiss that ground of Appeal. We also reject the argument that failure to hold an identification parade, and the non- recovery of the stolen articles made conviction unsafe. As this was a case of identification by recognition, an identification parade was unnecessary. The non-recovery of the stolen items did not in any way point to the innocence of the appellants.”**

25. There is no doubt that the prosecution’s evidence was well corroborated but even in cases of uncorroborated single-witness-evidence there can still be a legal conviction. This issue has been a subject of consideration in various cases including one before the Court of Appeal of Uganda in **Obwana & Others v. Uganda (2009)2 EA 333** where the Court presented itself thus:

**“It is now trite law that when visual identification of an accused person is made by a witness in difficult conditions like at night, such evidence should not ordinarily be acted upon to convict the accused in the absence of other evidence to corroborate it. ....This need for corroboration, however, does not mean that no conviction can be based on visual identification evidence of a sole identifying witness in the absence of corroboration. Courts have powers to act on such evidence in absence of corroboration. But visual identification evidence made under difficult conditions can only be acted on and form a basis of conviction in the absence of corroboration if the presiding judge warns himself/herself and the assessors of the dangers of acting on such evidence.”**

26. Going by the above evaluation of the evidence and on the strength of the case law, this Court finds that the deceased did not commit suicide but was killed by strangulation. Further, this Court finds that the accused persons were positively identified as the ones who attacked and killed the deceased. This Court saw the witnesses testify and observed their demeanors. They were truthful and credible witnesses. It was also confirmed that there was no grudge between any of the witnesses and the accused persons. The accused persons were therefore properly placed as the assailants and their defences that they were not at the scene as alleged can only be deemed as afterthought. Their identification by recognition was free from any error.

27. The second ingredient is also proved against the accused persons.

**c. Proof that the said unlawful act was committed with malice aforethought:**

28. Section 206 of the Penal Code defines malice aforethought as follows: -

**“206. Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances: -**

- a. An intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;**
- b. Knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused.**
- c. An intent to commit a felony.**
- d. An intention by the act or omission to facilitate the fight or escape from custody of any person who has committed or attempted to commit a felony.**

29. The Court of Appeal has on several occasions dealt with this aspect. In the case of **Joseph Kimani Njau vs R (2014) eKLR** in concurring with an earlier finding of the Court, but differently constituted in the case of **Nzuki vs R (1993) KLR 171** held as follows: -

**“Before an act can be murder, it must be aimed at someone and in addition, it must be an act committed with one of the following intentions, the test of which is always subjective to the actual accused; -**

- i. The intention to cause death;**
- ii. The intention to cause grievous bodily harm;**
- iii. Where the accused knows that there is a serious risk that death or grievous bodily harm will ensue from his acts,**

and commits those acts deliberately and without lawful excuse with the intention to expose a potential victim to that risk as the result of those acts.

It does not matter in such circumstances whether the accused desires those consequences to ensue or not in none of these cases does it matter that the act and intention were aimed at a potential victim other than the one succumbed. *The mere fact that the accused's conduct is done in the knowledge that grievous harm is likely or highly likely to ensue from his conduct is not by itself enough to convert a homicide into a crime of murder. (See Hyman vs. Director of Public Prosecutions (1975)AC 55".* (emphasis added).

30. In the case of **Nzuki vs. Republic (1993) KLR 171**, the accused person had dragged the deceased out of the bar and fatally wounded him with a knife. There was no evidence as to their having been any exchange of words between Nzuki and the deceased neither was there any indication as to why Nzuki went into the bar and pulled the deceased straight out and stabbed him. It was rightly observed in that case that the prosecution was not obliged to prove malice but just as the presence of motive can greatly strengthen its case, the absence of it can weaken the case. The Court of Appeal in allowing an appeal and substituting the information of murder with manslaughter observed: -

*“There was a complete absence of motive and there was absolutely nothing on record from which it can be implied that the appellant had any one of the intentions outlined for malice aforethought when he unlawfully assaulted the deceased with the fatal consequences. Other than observing that the appellant viciously stabbed the deceased and in so doing intended to kill or cause him grievous harm, the trial court did not direct itself that the onus of proof of that necessary intent was throughout on the prosecution and the same had been discharged to its satisfaction in view of the circumstances under which the offence was committed. Having not done so, we are uncertain whether malice aforethought was proved against the appellant beyond any reasonable doubt. In the absence of proof of malice aforethought to the required standard, the appellant's conviction for the offence of murder is unsustainable. His killing of the deceased amounted only to manslaughter.”*

31. By weighing the circumstances under which the incident occurred and the foregone legal discourse I do not find evidence of malice aforethought. The deceased was attacked in circumstances which were not brought out by the prosecution to have been premeditated. In fact, there is no evidence as to why the accused persons attacked and killed the deceased. Since malice is not proved, the last ingredient is answered in the negative.

32. As the last ingredient is not proved, the offence of murder is not proved as against the accused persons. The accused persons **JACOB CHACHA MWITA** and **PETER MWITA CHACHA** are hence **NOT GUILTY** of the murder of **GATI CATHERINE MWITA**. However, the deceased lost her life because of the actions of the accused persons, but of course without any malice aforethought.

33. In view of the provisions of **Section 179(2)** of the **Criminal Procedure Code**, Chapter 75 of the Laws of Kenya and looking at the evidence on record and as analysed hereinbefore, this Court finds the accused persons, **JACOB CHACHA MWITA** and **PETER MWITA CHACHA** guilty of the offence of **Manslaughter** contrary to **Section 202** of the Penal Code and each of them is hereby convicted accordingly.

**DELIVERED, DATED and SIGNED at MIGORI this 31<sup>st</sup> day of July 2017.**

**A. C. MRIMA**

**JUDGE**