



**REPUBLIC OF KENYA**

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

**HCCRC NO. 8 OF 2016**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**GORDON AGALLO OUYA.....ACCUSED**

**JUDGMENT**

The accused is charged with Murder Contrary to Section 203 as read with Section 204 of the Penal Code.

The Information states that on the 21st day of December 2015 at Manyatta Estate, Kisumu East Sub-County within Kisumu County he murdered one **Racho Atieno**.

The accused pleaded not guilty to the charge. The prosecution called four witnesses.

The star witness was thirteen years old D S (PW3) who testified that on the fateful night he and another boy known as B were resting at the gate of their home when a man who he identified as the accused asked a woman he was with if they would go together before stabbing her with a knife. The accused then hid the knife. The woman was taken to hospital by his (PW3's) father. He testified that he had seen the accused many times before and that not only did he identify him aided by the security light but that he recognized his voice. He did not know what happened to the woman afterwards.

Silas Owiti Ombura (PW1) told this Court that the deceased was his niece and that upon learning of the incident he went to Jaramogi Oginga Odinga Hospital where she was admitted. He stated that she had a stab wound below the left breast which she told him was inflicted by her boyfriend Gordon Agallo. On 9th January 2016 his niece died. He reported the matter to Kondele Police Station. He stated that he knew Gordon and identified him in the dock as the accused person. The accused was already in police custody. According to Corporal Naftally Lagat (PW3) the accused had been taken to Kondele Police Station after being rescued from a mob that was threatening to lynch him. He was initially charged with attempted murder to which he pleaded guilty but after Racho died he was charged with murder.

Dr. Eddy Omondi Mboya (PW2) produced the post mortem report on behalf of Dr. Solomon Zara the pathologist who conducted the post mortem. He confirmed that the deceased had suffered a stab wound just below the ribs on the left side and the cause of death was complications resulting from infection within the abdomen due to the penetrating injury.

On his part the accused testified that on 25th December 2015 while in his house he received a call from one Justin informing him that his wife had been injured. He went to the scene and found she was bleeding from the left side of her belly and could not walk. When they went to the police station they were advised to take her to hospital and so they took her to Jaramogi Oginga Odinga Teaching & Referral Hospital. She was admitted. The next day him and Justin visited her before going to Kondele Police Station intending to file a report. He was however locked up and subsequently charged with this offence.

The issues for determination are, first, whether the death of the deceased arose from an unlawful act of the accused and secondly, whether it was of malice aforethought.

After carefully evaluating the evidence adduced it is my finding that the charge against the accused person has not been proved beyond reasonable doubt. A closer scrutiny of the evidence reveals several gaps which cast doubt in the case. Principally the case against the accused person revolves around the testimony of D S (PW3) who alleges to have seen the accused stabbing a woman. This witness told this Court that he was with somebody when this happened and that it was at night. He did not identify the woman nor did he see the knife he alleges he saw the knife that was used by the accused person. This was evidence of a single witness child witness which should be taken with a lot of caution – more so as he was unsworn. In my view this is one case where the prosecution should have called the other boy – B – to corroborate this story. This witness is also on record stating that his father took the woman to hospital. Why was his father not called to confirm this and to clarify whether the woman he took to hospital is in fact the deceased in this case. Given that the incident occurred at night it behoved the investigating officer to carry out an identity parade just so as to be sure that the accused is the person the witness saw committing the offence. It is even more so given that the witness described the scene having little light. Silas Owiti Ombura (PW1) testified that the deceased told him that she was stabbed by the accused person and even showed him the stab wound. We were not told that the deceased was in imminent expectation of death when she told him this. It was also alleged that when the matter was first reported to the police the accused was arrested and charged with attempted murder to which he pleaded guilty. However no evidence of that plea was laid before this Court.

The accused testified that he was called to a scene where he found his wife with injuries. That could well be and the prosecution required more cogent evidence to prove it was not the case. What if the woman the S saw being stabbed by the accused is not the deceased in this case. What if the woman S's father allegedly took to hospital is not the woman Silas Owiti (PW1) visited in hospital? What if – there are many what ifs in this case. Instead we find evidence with a lot of gaps and it is my finding that the accused must be given the benefit of doubt. Accordingly I find him not guilty of Murder Contrary to Section 203 as read with Section 204 of the Penal Code and acquit him. He shall be released forthwith unless otherwise lawfully held.

**Signed, dated and delivered at Kisumu this 27th day of July 2017**

**E. N. MAINA**

**JUDGE**