



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT KITALE.

CRIMINAL CASE NO. 6 OF 2014

REPUBLIC..... PROSECUTOR.

VERSUS

GLORIA CHEMTAI KIPKEU) .

ABED YUSUF MUHAMED)ACCUSED.

J U D G M E N T.

1. The first accused, **Gloria Chemtai Kipkeu**, and the second accused, **Abed Yusuf Muhamed**, are charged with murder, contrary to section 203 read with section 204 of the penal code, in that on the 26th October, 2013, at Swara Club within Trans Nzoia County, jointly murdered **Julius Kipkoech Rono**. It was the case for the prosecution that the deceased was an Administration Police Officer based in the County of Vihiga and was last seen on the material 26th October, 2013, in the company of the first accused with whom he maintained a love relationship despite being a married man.
2. On that material date, the first accused arrived at the Swara club in Kitale town and booked a room No. G12 for the night. She introduced herself to the attendant as Mildred Kosgei and presented a national identity card issued in that name. The attendant, **Felix Wangila Sifuna (PW1)**, provided the room but was informed by the first accused that she would be returning later. He checked her room on the following morning at about 8.00 a.m. and realized that it was still padlocked from the outside.
3. The attendant reported the matter to the club manager, **Wellington Mulira Kadenge (PW4)**, who gave instructions that an extra charge be imposed on the room since its occupant (first accused) had failed to return by the 27th October, 2013. Earlier, on the night of the material 26th October, 2013, at about 8.00 p.m., the first accused and the deceased had been spotted by the club watchman, **Stephen Onyango (PW2)**, drinking together at the club bar. They were also spotted by the club chef, **Kennedy Simiyu (PW3)**, from whom they ordered a meal of beef and “**ugali**” (**posho**) at about 9.30 p.m. the first accused paid for the meal.
4. The club chef reported off duty at 11.00 p.m leaving the first accused and the deceased taking alcoholic drinks at the bar. The deceased was taking a drink called “**Blue moon**” while the first accused took a drink called “**Guinness Stout**”.

Earlier, at about 10.00 p.m., the club watchman (PW2) had been alerted by the club attendant or room steward (PW1) that the first accused would go to the town and return to the club later. He (PW2) saw the first accused leave for town on her own.

5. As at the 28th October, 2013, the first accused had not returned to the club. Her room No. G12 remained locked. This prompted the club employees to forcefully unlock the door and gain access to the room. They were shocked to find the dead body of the deceased lying on a bed and covered with a mosquito net, a bed sheet and a blanket. They reported the matter to the police.
6. **P.C. William Kimutai Kemboi (PW7)**, of the scenes of crime section of the C.I.D. Kitale, proceeded to the scene and took photographs of the body of the deceased as it was found on the bed. The body was later identified for post mortem purposes by a brother to the deceased, **David Kiprotich Rono (PW6)**.

Dr. Godfrey Webala Wamukoya (PW9), produced the post mortem report which indicates that the case of death was cardio-pulmonary failure due to asphyxia due to strangulation and haemorrhage from cut wounds.

7. On the 28th October, 2013, when the body of the deceased was discovered in the club room, his wife, **Everlyn Chepkemoi (PW5)**, received a strange call and messages transmitted through the deceased's mobile phone. She was in Nakuru at the time. The phone call and messages aroused her suspicion such that she embarked on tracing the deceased through his mobile phone, relatives and colleagues but all in vain. She thereafter learnt from one Sgt. Tum of the Administration Police Emuhaya that the deceased was lastly seen on the 26th October, 2013, in the company of the first accused. She (PW5) knew the first accused as a person who lived with the deceased as his "wife".
8. She (PW5) also learnt that the first accused had gone to the deceased's quarters at his place of work and carried away belongings saying that she was instructed to do so. Having failed to trace her husband, Everlyne (PW5) obtained his identity card and bank card and proceeded to his bank where she learnt that a withdrawal had been made from his account on the 27th October, 2013. The CCTV camera footage of the withdrawal showed that it was done in Bungoma by the first accused while in the company of a male person. She (PW5) saw the footage on 2nd December, 2013 while the deceased was still missing.
9. She (PW5) learnt of the death of the deceased on 11th December, 2013 and proceeded to Kitale District hospital mortuary where he viewed the body and also identified it for post mortem purposes. She noted that the body had injuries on the head and learnt from her father-in-law that the deceased had been killed at Swara Club in Kitale. She was later astonished to learn that another withdrawal was made in the deceased's bank account on 18th December, 2013 at Bungoma.
10. On 10th January, 2014, **APC Antipus Kisorio (PW8)**, while in the company of the deceased's wife (PW5) and others proceeded to Bungoma in search of the first accused. They found her in the company of the second accused who went away when the first accused was arrested and taken to her house which was searched and some of the items belonging to the deceased found therein. Also found therein hiding under a bed was the second accused who was also arrested.
11. **Cpl. Joseph Kilonzo (PW10)**, investigated the case and gathered that the first accused after booking the room at Swara club using the name Mildred Kosgei proceeded to the club bar where she drunk alcohol in the company of the deceased before later leaving and saying that she would return. She left with the key to the room and had not returned after two or three days thereby prompting the club employees to forcefully gain access to the room where they found the deceased's body.
12. The investigations officer (PW10) also gathered that the phone lines used to call the wife of the deceased before she learnt of his death were traced to Bungoma and that one of the lines was used by the first accused. He (PW10) obtained CCTV images of bank withdrawals at the Equity Bank Bungoma branch ATM showing that the withdrawals were made by the first accused. He (PW10) further gathered that the first accused had not registered as a Kenyan citizen and therefore the

identity card she used to book a room at Swara club Kitale did not belong to her but a person called Eunice Wanjiru.

13. It was on the basis of all the foregoing evidence by the prosecution that both accused were charged with the present offence which they both denied.

The defence by the first accused was that the deceased was her husband and that he left on the 23rd October, 2013 for his home in Nakuru. She conversed with him on that 23rd October, 2013 and the 24th October, 2013, after he had arrived in Nakuru. Thereafter, she was unable to trace him on his phone or through his brothers called Benjamin, David and Rafnord and sisters Mercyline and Margaret.

14. She (first accused) contacted the deceased's superior officers at Emuhaya and was informed that the deceased could not be traced anywhere and was being awaited at work for him to be served with a dismissal letter due to his continuous irresponsibility of being drunk. She was advised to return home and wait. She later communicated with the deceased's sister Mercyline and they met in Eldoret where they intended to report the disappearance of the deceased but were told to do so at Luanda. She (first accused) went to Luanda where she met the deceased's brother Benjamin and Everlyne (PW5) whom she referred to as Veronica.

15. At Luanda, Benjamin indicated that he wanted to take her (first accused) and her child since the deceased had disappeared. She however, proceeded to Eldoret and thereafter to her rural home in Elgeyo Marakwet. At a later stage, she proceeded to Bungoma to her aunt who fetched for her a job at a shop belonging to the sister of the second accused.

16. She (first accused) went on to state that on the 9th January, 2014, an unknown lady called her on phone and informed her that the deceased wanted to speak to her (first accused). She conversed on the phone with a person who said that he was the deceased but did not sound like him. The person indicated to her that the phone was bad and that he had a cold. Initially, the person said that he would be coming to Emuhaya but later said that he would be coming to Bungoma to explain to her why he had to leave employment. He arrived in Bungoma on the following day and met her. In the process, he slapped and pushed her into a vehicle where she found Veronica (PW5).

17. Veronica, threatened her (first accused) for moving with her husband, the deceased. She (first accused) was thereafter taken to her house where the second accused was found and apprehended. Her property was also taken away after which she was brought to Kitale Police station along with the second accused and placed in an identification parade in which no witness identified her. She was then beaten, tortured in order to admit the offence but she did not. She contended that she has never killed a person and would not do so in her lifetime.

18. On his part, the second accused stated in defence that on the material 26th October, 2013, he was in Kibera-Nairobi prior to leaving for his home in Busia border. In the month of November, 2013, he was called to Bungoma by his sister who wanted him to assist her in operating a shop (boutique). Later, the first accused came to the shop looking for a job and was hired. Thereafter, he (second accused) returned home in Busia. He later left the place and returned to Bungoma where he was informed that the first accused was always late for work since she lived in Kanduyi.

19. He (second accused) agreed with his sister that they should accommodate the first accused at the sister's house. She (first accused) requested him for money for her children. He promised to give her money at a later stage.

On the 6th January, 2014, she informed him that her husband called her on phone and said that he would be coming to visit her. He thought that there was no problem with such visit.

On 10th January, 2014, as he and the first accused were proceeding to the shop, a person came and

held her before throwing her into a vehicle. He saw a woman (PW5) in the vehicle. He left the scene and went home after a crowd gathered.

20. After about twenty (20) minutes, he (second accused) was found in the house and beaten up. He was questioned about a pistol allegedly in the possession of the first accused. He was taken away together with the first accused to the Kitale police station where it was alleged that they had murdered the deceased. He was tortured and told to admit the offence which he knew nothing about. He was beaten and asked to sign a document before being arraigned in court for a murder he did not commit. A mobile phone allegedly belonging to the deceased actually belonged to him (second accused). He contended that the first accused was simply his employee through his sister.

21. At the close of the defence case, Learned Counsel for both accused, **Mr. Okile**, submitted that the first accused was not positively identified as the lady who was with the deceased at the Swara lodge in Kitale. That, the identity card allegedly used by first accused did not belong to her. That, the first accused had a marital relationship with the deceased so that the deceased's property found in her possession could not be used to incriminate her. That, there was no evidence of bad motive by the first accused against the deceased.

22. Learned Counsel further submitted that there was no evidence that the first accused killed the deceased and therefore, the charge was not proved against her.

As for the second accused, learned counsel submitted that there was nothing to link him with the offence. That, he was never seen with the first accused or the deceased at Swara club.

That, none of the prosecution witnesses identified him, neither was any confession extracted from him or the first accused. Therefore, they cannot be said to have admitted the offence.

Learned Counsel submitted that the circumstances under which the two accused were found together was properly explained. He urged this court to acquit them.

In response, the Learned Prosecution counsel, **Mr. Kakoi**, relied on the evidence on record.

23. Under section 203 of the penal code, any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.

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, would under section 206 of the penal code establish malice aforethought.

In this case, there was no dispute that the cause of the death of the deceased was cardio-pulmonary failure due to strangulation and haemorrhage from cut wounds.

24. The post mortem report (P. Exh. 9) indicated that the deceased suffered deep cut wounds on his head and coupled with the manner in which his dead body was discovered at a lodge room, there was no doubt that he was assaulted and strangled by an individual or individuals whose intention was to clearly cause his death. Simply put, the deceased was murdered.

25. The basic issue for determination was therefore whether the deceased was murdered by the first accused or the second accused or both. Both accused denied the offence with the first accused implying that she was framed up at the behest of the wife of the deceased (PW5) who was her “**co-wife**” and unhappy about her relationship with the deceased.

The second accused implied that he was merely a victim of his association with the first accused.

26. The burden to prove to the required standard the guilt of the two accused or any one of them lay squarely on the prosecution. There was no obligation on the part of the accused to prove their

innocence.

In the attempt to establish the charge against the accused, the prosecution relied at most on indirect or circumstantial evidence as there was no witness who saw the accused persons assaulting and strangling the deceased to death.

27. The principle as regards the application of circumstantial evidence was enunciated in the case of **R. Vs. Taylor Weaver & Donovan (1928) 21 CR. APP. REPORTS 20**, in the following words:-

“Circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which by intensified examination is capable of proving proposition with the accuracy of mathematics. It is no derogation of evidence to say that is circumstantial.”

In the case of **Mwita Vs. Republic [2004] 2 KLR 60**, the Court of Appeal stated that:-

“It is trite that (sic) in a case depending exclusively upon “circumstantial” evidence, the court must, before deciding upon a conviction, find that the inculpatory facts are incomparable with the innocence of the accused and incapable of explanation upon any other hypothesis than the guilt.”

28. Before drawing the inference of the accused's guilt from circumstantial evidence, the court must be sure that there are no other co-existing circumstances, which would weaken or destroy the inference. (see, **Musoke Vs. Rep. [1958] EA 715**).

Herein, and with regard to the first accused, the circumstantial evidence against her was based on the facts that she booked a room for the night at Swara club Kitale and in so doing, she used a name and identity card belonging to other unknown persons.

29. At the time of booking the room, she (first accused) was attended by Felix (PW1) who clearly saw and visually identified her in favourable conditions. He said that she represented herself to be one Mildred Kosgei and presented an identity card bearing that name. The identity card was later found to have been issued to a person called Eunice Wanjiru. This was revealed in the course of investigations conducted by Cpl. Kilonzo (PW10).

The investigations further revealed that the first accused had never registered herself as a Kenyan citizen thereby implying that she was not in possession of a national identity card.

30. The evidence by the club's watchman (PW2) and the club's chef (PW3) showed that after booking the room, the first accused was later spotted in the club's bar and restaurant in the company of the deceased. This was before 11.00 p.m. and the two were taking alcoholic drinks. It was within that

period that the first accused placed on order with the chef (PW3) for a meal of beef and “ugali”.

31.The chef (PW3) indicated that he reported off duty at about 11.00 p.m. when the first accused and the deceased were still in the bar.

The watchman (PW2) indicated that at about 10.00 p.m., the attendant (PW1) alerted him that the first accused was to leave for town and be back later. He (PW2) actually saw the first accused leave the club while on her room.

The attendant (PW1) confirmed that the first accused had told him that she would be leaving for town and be back at the club later, but by 8.00 a.m. on the following day she had not returned and her room remained padlocked. He (PW1) found it necessary to report the matter to the manager (PW4).

32.The evidence by the attendant (PW1), the watchman (PW2) and the chef (PW3) essentially showed that the first accused was the last person to be seen with the deceased just prior to his death. She was the last person to be seen with him while he was alive and the fact that she did not return to the club to use her room even after being seen with the deceased within the club only for his dead body to be later found in the room lying on a bed covered with beddings and a mosquito net and having injuries on the head and neck strongly implied that most likely than not, she (first accused) had a major role to play in the death of the deceased either acting solely or with an accomplice or accomplices.

33.All the foregoing inculpatory facts are not only cogent but also credible enough. They are incompatible with the innocence of the first accused as portrayed in her defence which has been dislodged, discredited and reduced to a mere afterthought. On the contrary, the inculpatory facts are consistent with the guilt of the first accused and this is fortified by the fact that she never at all returned to the Swara club as promised and instead, she later proceeded to the deceased's quarters in Emuhaya where she carried away some of his property to Bungoma and also used his ATM card to access and draw money from his bank account while he was at the material time reportedly missing and his body was in a lodge room decomposing.

34.It is without doubt that the first accused planned and executed a criminal transaction with utmost precision and in the process took away the life of her “**Lover**” for reasons best known to herself.

With regard to the second accused, the only incriminating fact was that he was found in the company of the first accused at the time of her arrest and that he took off only to be later found under a bed inside the first accused's house. This indeed raised suspicion but did not amount to sufficient and credible circumstantial evidence against him for a sound conviction.

Suspicion, no matter how strong, can never on its own be proper and sufficient evidence of commission of an offence.

35.The second accused as contended in his defence, was indeed a victim of his innocent association with the first accused.

In sum, the prosecution has proved beyond reasonable doubt that the first accused was responsible for the murder of the deceased. She is therefore found guilty as charged and convicted accordingly.

The second accused is found not guilty as charged and is accordingly acquitted.

[Delivered and signed this 18th day of March, 2015.]

J.R. KARANJA.

JUDGE.

