



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CRIMINAL CASE NUMBER 33 OF 2018

REPUBLIC.....PROSECUTION

VERSUS

HILLARY MAURICE KIPRONO alias JUSTIN KIBO.....ACCUSED

J U D G M E N T

1. The issue for determination is whether, after the full trial, the prosecution has proved, beyond a reasonable doubt, that Hillary Maurice Kiprono alias Justin Kibor did, on 12th February 2018 at Rafiki area in Kampi ya Moto Location Rongai Sub County within Nakuru County, murder Joyce Wangari Gicheha.

2. To do so the prosecution must provide evidence to establish the ingredients of murder as set out in **Section 203 as read with Section 204 of the Penal Code.**

“Section 203. states Murder

Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.

Section 204. Provides Punishment of murder

Any person convicted of murder shall be sentenced to death.”

The Supreme Court in the case of **Muruatetu** removed the mandatory nature of this sentence.

The prosecution must establish the fact of death, that death was caused by the accused person, unlawfully, and with malice afterthought.

3. From the evidence on record, both from the prosecution and the defence it is not in dispute that the accused was married to the deceased. He told the court that they had between them four (4) children but one was deceased. These children include PW1 and PW2. He also confirmed that they had been separated since 2010.

4. On 12th February, 2018, PW1 EK was by then ten (10) years old and in class three (3). He told the court he was going to school in the morning in the company of MC and her brother K when he met the accused his father. He got hold of him, cut a kiboko with which he beat him while telling him *“kaa ukijua mama yako ni maiti”* (literally *just stay knowing that your mother is a corpse*).

5. It is these two (2) MC and K who upon arriving at school before him, told the sister that he had been caught and beaten by his father and he was chasing him around. By the time he got to school, his sister PW2 JJ had been informed that her brother EK had been caught by her father. She went and reported to the teacher on duty who asked for her mother’s number. She gave her the number and then went to class. When EK arrived he found that his mother had been rang to come to school to check out on him. The teacher then rang his mother again on phone. He spoke to her and told her that his father had beaten him. She told him to stay in class.

6. Shortly thereafter, and according to JJ it was during the 1st lesson they were both called from their class rooms and told to go home. When they got out of the class rooms they found their cousins on boda boda and they ferried them home. Upon getting home they found people wailing that their mother had been slaughtered.

7. From the evidence of **PW3, Mary Nyambura Ndung’u**, the wife to the deceased’s cousin, (deceased was sister to her husband’s father) about 7.00 a.m. on that day, 12th February 2018 the deceased went to her house, and told her that her son EK had been hijacked from school. They left for school. As they walked, deceased received a phone call from the teacher and spoke to EK, who told her that his father had hijacked him and assaulted him. It is then that the deceased told her that her husband had been threatening to kill her and her children (this

witness broke down and cried). She told the court how they met with the deceased, whom she knew very well, and when she saw the deceased she told her aunt that they should run away. However the deceased told her that the accused could not harm her in daylight. However when they met, a quarrel ensued, he was asking her why she had told the children to run whenever they saw him. She denied the accusation. They began to fight, PW3 had a baby on her back, but she went to assist her aunt. It was then that the accused took out a knife, threatened her with it and proceeded to stab the deceased severally (witness broke down again and was crying). The accused ran away. She was screaming as the deceased lay on the ground. A certain mzee whose name she could not recall is the one who asked for her lessa and covered her aunt. She raised alarm and other people came including her aunt's brother and neighbours who took her to the mortuary.

8. **PW4 Joseph Ngugi Gichena** and **PW5 Martine Kiohe Maina** attended the post mortem.

9. **PW6 Sally Bor** was the teacher who received the report from JJ about her brother having been taken by a person on his way to school. She got the deceased's number called her and told her that her son had not arrived in school. However soon thereafter EK arrived. She rang the same number, gave EK the phone and he spoke to his mother and went to class. Shortly thereafter three people came to take EK and JJ from school, saying that their mother had been killed. Other teachers accompanied the children home. She said she knew the deceased as she was EK's class teacher in class 2. She did not know EK's father.

10. **PW7 was Dr. Ngulungu Titus**. He told the court he conducted the post mortem on the body of Joyce Wangari Gicheha at Nakuru Level 5 Hospital. He found multiple stab wounds, on the gluteal region, buttocks, front of the chest and abdomen; four (4) stab wounds to the chest, two (2) stab wounds in the back, three (3) stab wounds in the abdomen, two (2) stab wounds on proximal arms. He ascertained the cause of death, sharp trauma, chest and heart injury attended by massive blood loss.

11. **PW8 No. 75478 PC Evans Kimutai Suta** received report on 4th July 2018 that a murder suspect in the death of one Joyce Wangari, murdered in February 2018 had been traced to within Marakwet, Kapsowar through his Safaricom number which he gave. The name of the person was Hillary Maurice Kipruto and he was asked to arrest him. Led by Cpl Ekiru (now deceased) they found the accused and arrested him on 10th July 2018. They found that he had two identity cards, the other bore the names Justin Kibor Kiprob.

12. **PW9 No. 237004 IP Daniel Gichuku** on 12th February 2018 at 9.45 a.m. was informed by the Deputy OCS then at Rongai Police Station that there had been a murder within Rafiki area. He proceeded to the scene and found the deceased Joyce Wangari Gicheha lying on the roadside of a feeder road. The body had several stab wounds even abdominal content had oozed out, he made inquiries and learnt that it was her husband Hillary Kiprono who had done it. He tried to comb the area for the murderer and the weapon in vain. Body was moved to mortuary and post mortem conducted. He was not able to arrest the culprit, as he proceeded to college. He later learnt that the accused had been arrested. He confirmed that he relied on the statement of PW3 who was present at the scene and witnessed the quarrel, and the killing.

13. In his defence the accused person made a sworn statement. He told the court that at the material time he was in Marakwet where he worked as a mason. He denied killing his wife. He said that despite being separated from his wife he had a good relationship with her and the children. That the children knew him very well. That he paid their fees, and went to their school when necessary. He said his son EK knew him very well, but that he lied to court. He also said that PW3 knew him very well but she lied to court. He said he was not aware that his wife had died and that is why he had not attended the funeral. That no one told him that she had died. He said he could not bring his witnesses because he could not contact them, and also that they had court phobia.

14. The accused person in his defence raised the defence of an alibi.

15. From the evidence on record it is not in doubt that Joyce Wangari Gicheha died a very brutal death. She was stabbed several times with a sharp object, and the fatal wound is the one that injured the head causing massive blood loss. There is no doubt that the person who inflicted the said wounds intended to cause grievous harm and death. The number of stab wounds their distribution, clear evidence of malice afterthought. The question is, who did this?

16. From the evidence on record the accused person was estranged from his wife. It is evident from PW1 EK that he said his father always uttered words to the effect that he would kill his mother. The words he heard on 12th February 2018 were not the first time. This was a ten (10) year old boy. He did not come across as a child who had been coached on what to say. He appeared to speak from what he knew, and what had happened to him that day. He knew his father, that fact the accused confirmed and could not have confused him with anyone else. There does not appear to be any reason why the boy would come up with such a tale about his father. The fact of his being waylaid by a person who "kidnapped" him was corroborated by the teacher who received the information and called his mother. The boy arrived in school after parade as established by JJ's evidence, as that is when the mother we called the second time and told that he had arrived. The fact that MC and K who were with him when he was "taken" by his father did not testify does not challenge this part of the case from the prosecution.

17. There is the eye evidence of PW3, the deceased went to her house at 7.00 a.m. to tell her what had happened. The teacher confirmed she called her around that 7.00 a.m. because that is when she received the report from JJ. They left her (PW3's) house about 7.20 a.m. and it is after 7.20 a.m. that the deceased was rang, in her hearing, as they were going to school that EK told the mother on phone what had happened. Soon after that, the accused appeared. She knew the accused well, a fact the accused confirmed. She saw him and heard the quarrel, his issue, why she had told the children to run away whenever they saw him. This fact is corroborated by the fact that he was seen chasing the boy, EK. The boy must have run on seeing him. It appears that there was an attempt to take the boy with him which he resisted hence the caning.

18. Clearly the accused was angry with his wife, accusing her of turning the children against him. When she denied it and the fight broke. The PW3 witnessed the fight. She saw the accused stab the deceased severally before he fled.

19. Other people came to the scene, but she is the only one who testified. Was her evidence credible? She was cross examined by the counsel for accused Mr. Opar, at length, and though there appeared to be some discrepancies between her evidence and her statement to the police in particular the absence of the fact that the deceased told her accused had threatened to kill her, the rest was corroborated by the

evidence of EK, the teacher, the investigating officer. Clearly the accused was present on that foot path on that morning. He waylaid his son, and when his wife showed up, he attacked and killed her. He may have intended to do it elsewhere but the opportunity availed itself, he was angry because he believed she had turned the children against him and he attacked and killed her.

20. His alibi? In **Karanja -Vs- Republic (1983) KLR 501** court stated that:-

“in a proper case, the court may, in testing a defence of alibi and in weighing it with all the other evidence to see if the accused’s guilt is established beyond all reasonable doubt, take into account the fact that he had not put forward his defence or his alibi, if it amounts thereto at an early stage in the case, and so that it can be tested by those responsible for investigation and preventory suggestions that the defence was an afterthought.”

21. It is trite that an accused person is not required to prove his alibi, but he is required to at least give some evidence see **Eric Otieno Meda vs Republic [2019] eKLR** where the Court of appeal stated;

“(a)An alibi needs to be corroborated by the other witnesses, and not just a mere regurgitation of the events from the accused’s point of view.

(b) An alibi defence needs to be introduced at an early stage so as to allow it to be tested, especially during cross-examination of the trial.

(c) The alibi defence or evidence may often rest on the credibility of the accused and the reliability of the evidence that he or she has presented in court.

(d) The accused does not need to prove the alibi, but the prosecution must have presented its case that the accused is guilty beyond a reasonable doubt so as to allow the alibi to fail.)”

22. In this case the accused simply stated he was in Marakwet working at someone’s residence with some people. He did not name the person he was working for or any of the persons he was allegedly working with. At no point during the hearing was it put to any of the witnesses that the accused was a resident of Kapsowar Marakwet and could not have been at the scene that morning. Every piece of evidence points at the accused person, the motive, the anger, and the testimony of the children. In fact, even when the police arrived at the scene, they were told that he was the one who had killed the deceased. Proof that PW3 had seen and identified him.

23. It is in **Bonaya Tutu Ipu vs Republic [2015] eKLR** that the court pointed out that:

“It is in rare circumstances that the intention to cause death is proved by direct evidence. More frequently, that intention is established by or inferred from the surrounding circumstances.”

From the evidence before me this is one of the rare cases, where the events leading to the deceased’s death are established by direct evidence.

24. The malice aforethought was well established by the manner in which the accused attacked the deceased, In the persuasive decision of **Chesakit vs Uganda, Cr. App. No. 95 of 2004**, the Court of Appeal of Uganda stated that in determining in a charge of murder whether malice aforethought has been proved, the court must take into account factors such as the part of the body injured, the type of weapon used, if any, the type of injuries inflicted upon the deceased and the subsequent conduct of the accused person. The accused herein used a knife, and stabbed the deceased severally then ran away.

25. Additionally in **Rex vs Tubere S/O Ochen (1945) 12 EACA 63**, the former Court of Appeal for Eastern Africa stated thus on the issue:

“It (the court) has a duty to perform in considering the weapon used and the part of the body injured, in arriving at a conclusion as to whether malice aforethought has been established, and it will be obvious that ordinarily an inference of malice will flow more readily from the case, say, of a spear or knife than from the use of a stick...”

The accused used a sharp object. Stabbed the deceased on the abdomen and chest severally in the presence of PW3.

26. From the foregoing it is evident that the prosecution has proved all the ingredient of murder. I find that the charge against the accused person stands proved. I find him guilty as charged and convict him accordingly.

DATED, SIGNED AND DELIVERED THIS 17TH DAY OF NOVEMBER, 2021.

MUMBUA T. MATHEKA

JUDGE

In the presence of:-

Court Assistant Edna

For state: Ms. Murunga

For accused: Mr. Opar

Accused: Present

Mr. Opar I need two weeks to mitigate.

We seek a presentence report from probation and after care services

Court: Mitigation on 14th December 2014.

The pre-sentence report be filed on or before the 14th December 2021. PACS Nakuru be served with this order for compliance.