



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL CASE NO. 34 OF 2014

REPUBLIC.....PROSECUTOR

Versus

JEREMY KIOGORA MBAE.....ACCUSED

**JUDGMENT**

1. The Accused herein has been charged with murder contrary to section 203 as read with section 204 of the Penal Code Cap 63 Laws of Kenya.

2. The particulars of the offence are that on 19<sup>th</sup> May 2014 at Kiringa Location in Imenti South District within Meru County jointly with others not before the Court murdered **Rosemary Gacheri**.

3. During the hearing the prosecution called eleven (11) witnesses. The defence called 1 witness. Their testimonies were recorded verbatim and are part of the record. The defence also filed its Submissions which I will dully consider.

**ANALYSIS AND DETERMINATION**

**Elements of Murder**

[1] According to **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.”**

4. Thus, to secure a conviction for murder, the prosecution must prove beyond reasonable doubt the following:

**(i) The death of the accused and the cause of death;**

**(ii) That the accused caused the unlawful act or omission which caused the death;**

**(iii) That the accused had malice aforethought as defined in section 206 of the Penal Code.**

5. Instances of malice aforethought are stated in **Section 206 of the penal Code** as follows;

**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 flight or escape of any person who has committed or attempted to commit a felony.**

## **The death of the Deceased and cause of death**

6. The evidence of **Pw 9 Jackline Wendo** medical officer at Meru Teaching and Referral Hospital confirmed the death of the deceased and the cause of death was stab wounds through the heart causing massive haemorrhage. The post mortem report was produced as PExh1. The prosecution has therefore established the death of the deceased and the cause of death.

### **Whether the accused caused the unlawful act or omission which caused the death;**

7. **Pw1 Emily Ntinyari**, a sister to the deceased testified that at the material day at about 7.00pm, she was at her sister's house with her sisters Juliet and Rosemary (the deceased). The deceased received a phone call and she went out to answer it. According to her the deceased overstayed and so she went out to check. She saw some object in white. Upon touching she realized it was the deceased and was leaning on the side of the ditch. She still had her phone in her hand. She tried to call her but in vain. She shouted and called Juliet to come and witness what she has seen. Juliet came and informed her it seemed Rosemary was dead. She shone her phone's torchlight upon and observed her lifeless body. She also saw blood oozing from the body. When people rolled the body over she saw knife stabs as well as blood oozing from her back.

8. **PW1** continued to testify that Rosemary's phone was off at the time. They however accessed it and saw the last number that called the deceased. She learnt from Juliet that this last number belonged to Henry. In cross-examination she steadfastly stated reiterated her said evidence but added that Henry, a neighbour had a relationship with the deceased.

9. **PW2** was Henry Gikunda. His evidence was that he was in a relationship with the deceased in 2013 but he terminated it when he married Jackline. On the material day he was called by the deceased and he went out to the road to meet the deceased. Immediately he met the deceased Jackline and Jeremy (the accused) came to them and started to threaten him. Jackline hit him several times. She said to him that the two are breaking people's families- this was the reason she hit him. He had been injured in a motorcycle accident and could not stand up to their threats. He was also afraid and so he chose to run away. He however heard the two saying that they have seen that Henry Gikunda had called the deceased on her phone. He stated that he knew the accused well as he was his cousin. He recognized him also because of his height. As for Jackline, he was his wife for one month and she recognized her voice on the material night. These event took place at night about 7.15pm.

10. In cross-examination he stated that they were seated with the deceased on the side of the road at the material when Jackline and the accused came to them. He said that he did not see the accused hit the deceased.

11. The evidence of **Pw3, Beatrice Muigai** mother to Pw2, was that on a Saturday of which she could not remember the exact date, the deceased came to her gate and she heard her accusing Jackline of stealing her husband. She stated that the deceased said to Jackline that she will be sleeping with him during the night and Jackline during the day. Jackline was in her house. The deceased then left but Jackline remained. The witness also left to buy milk. When she came back after buying the milk she heard the mother of the deceased screaming that "the dogs of Nkunja have killed Rose". She explained this to refer to the children of Nkunja. The witness went to call Jackline but she was not home. She decided to call the sub-chief and informed him that the people she had asked him to warn about abusing each other have now assaulted one another. She was referring to Jackline and the deceased. A crowd came demanding to see Jackline. The subarea held her so that she could produce Jackline. She said she did not see the accused at the scene of the material day. She confirmed two crucial matters; (1) that Jackline was married to PW2; and (2) that PW2 was also living with the deceased at the same period.

12. **Pw4 Justa Kanyamu M'Arithi, neighbour to the deceased** was informed by PW1 of the unfortunate incident and she went to the scene. She saw the lifeless body of the deceased. **Pw5 John Kinoti Mwarima also** was called but by Beatrice and went to the scene. Police took the body away.

13. **PW6** was the Investigations Officer and he gave details of his investigations into this case. He clearly narrated the witness accounts he received during investigations. He also stated that he obtained the phone belonging to the deceased, blood-stained clothes worn by the deceased at the time of her death as well as clothing from the accused. He also obtained blood samples from the deceased and the accused and sent them to the Government Chemist. The phone was analyzed and results were produced as exhibits. Of great significance was the evidence of **PW11** who produced the report by the Government chemist (Pexh 5) which showed inter alia that the blue trouser recovered from the accused bore blood from a female origin giving his testimony he had not received the results or the exhibits from the Government Chemist. Jackline is still at large. He forwarded the phone of the deceased to DCIO. He concluded that Jackline and the accused murdered the deceased because they were left with her at the scene when PW2 ran away to avoid further beating by the two.

14. **Pw7 Mary Karambu Thurairia** also testified that Jackline had informed her on the material day that "She had finished what she had planned." She testified that she learnt on the following day that Rose had been killed and Jackline had disappeared.

15. **PW8, Kelvin Munene Muriuki & Pw11 Cpl. Henry Makokha gave details on** the arrest of the accused. It was both their testimonies that the accused had blood stain in her clothes. The clothes were forwarded to the Government analyst. Pw11 produced the Report by Government Chemist which showed that the blood on the shirt short and blue trouser was of unknown female person. The exhibit memo was produced as Pexh4 whereas the Report was produced as Pexh5.

16. **Pw10, Cpl. Alexander Mathenge Nthiga** an officer based as DCI Crime Unit analysed the deceased mobile phone and outgoing call records. The same were produced as Pexh 2a and 2b.

17. It is never my style to rehash evidence as was recorded as such is duplication of efforts. However, given the facts of the case, it has become necessary to reproduce the important aspects of the evidence.

## **Circumstantial evidence**

18. The evidence of the prosecution as highlighted above is circumstantial evidence. No murder weapon was recovered from the scene. The investigators also never sought to provide photos of the scene. What does the law say on conviction based on circumstantial evidence?

19. In SAWE –V- REP [2003] KLR 364 the Court of Appeal held.

**“1. In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypotheses than that of his guilt.**

**2. Circumstantial evidence can be a basis of a conviction only if there is no other existing circumstances weakening the chain of circumstances relied on.**

**3. The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution. This burden always remains with the prosecution and never shifts to the accused.**

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**7. Suspicion, however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt.”**

20. Similarly in ABANGA alias ONYANGO V. REP CR. A NO.32 of 1990(UR) the Court of Appeal set out the principles to apply in order to determine whether the circumstantial evidence adduced in a case is sufficient to sustain a conviction as follows:

**“It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: (i) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established, (ii) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused; (iii) the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.”**

21. In this case, Rosemary Gacheri was found dead in a ditch near her home. See the evidence. According to PW2, on the material night at about 7.15pm, the deceased called him and so he went out to meet her. The evidence of PW1 was that the deceased was called on phone and she went out to answer the call. According to her she learnt later that it was PW2 who had called the deceased. Although PW2 stated that it was the deceased who called him, he however confirmed that he met the deceased and sat somewhere besides the road. The evidence of PW2 was clear that he was at the scene on the material day when the deceased was killed.

22. According to PW2, while they were seated on the side of the road with the deceased, the accused and Jackline came and started to threaten them. Jackline was his wife to whom he was married for one month and knew her well. He confirmed that he knew her voice and recognized it was her through her voice and when she was making threats to the two. More specifically, he stated that Jackline was saying to him that the two were breaking her home. From the evidence, this was in reference to the intimate affair between the deceased and her husband, PW2. His evidence was that Jackline even hit him several times. PW2 testified that he had been involved in a road traffic accident and could not withstand the threats and beating from the accused and Jackline and so he fled with some injuries. His evidence was that he saw the accused in the company of Jackline. He recognized him from his height. He stated categorically that he knew the accused well for he was his cousin. I am aware that it was at night and I should be warned of the dangers of identification in such difficult circumstances. I am also aware that a witness may be mistaken. The accused, **Dw1 Jeremy Kiogora Mbae** raised an alibi in his defence that on 17/5/2014 he stayed at his place as he was unwell until 1:00 P.m. and later went to visit his cousin called Mawira. That he slept at his cousin’s place till the next day when Mutembei, Mugendi and Munene came and arrested him for the killing of the deceased herein. That they told him that Henry Gikunda had confessed after being beaten that he was part of the persons who had killed the deceased. The police later took him to Kanyakeni Police station and later searched his house. He also found Gikunda at the police station where he confronted him. He told him that he was beaten thoroughly and that’s why he had mentioned his name.

23. From the evidence adduced, the accused knew Jackline. He however also denied that he was present at the scene on the material day. He confirmed that Henry Gikunda (PW2) is his cousin. In cross-examination he stated that he had called upon his cousin Mawira to come and testify but was informed that he no longer lived in the said premises. He also stated that he would call his sister i.e. Buradina Javera but they never came to testify. I am aware that the accused does not have the burden of proving his alibi but the prosecution does. However the alibi should be raised at earliest time possible. See the case of **Republic v G N K [2017] eKLR**;

**“In respect to the defense of alibi, I am alive to the principle that by setting up an alibi defense, the accused does not assume the burden of proving the alibi (Ssentale v. Uganda [1968] EA 36). The prosecution always bears the burden of disproving the alibi and proving the appellant’s guilt (Wang’ombe v. Republic [1976-80] 1 KLR 1683).**

**However, the accused was required to raise the defense of alibi at the earliest opportunity to enable the prosecution and the investigating officer time to check it out to determine its veracity or lack thereof. The principle has long been accepted that an accused person who wishes to rely on a defence of alibi must raise it at the earliest opportunity to afford the prosecution an opportunity to investigate the truth or otherwise of the alibi. In R. v. Sukha Singh s/o Wazir Singh & Others (1939) 6 EACA 145, the former Court of Appeal for Eastern Africa upheld a decision of the High Court in which it was stated:**

**"If a person is accused of anything and his defence is an alibi, he should bring forward that alibi as soon as he can because, firstly, if he does not bring it forward until months afterwards there is naturally a doubt as to whether he has not been preparing it in the interval, and secondly, if he brings it forward at the earliest possible moment it will give prosecution an opportunity of inquiring into that alibi and if they are satisfied as to its genuineness proceedings will be stopped".**

24. The evidence by PW2 dislodges the alibi and places the accused at the scene at the material time. In addition, the demeanour of the accused was that he was not telling the truth and his alibi was merely a convenient way of removing himself from the scene. The alibi was an afterthought and I dismiss it.

25. The evidence of PW2 is convincing that the person who accompanied Jackline was his cousin Jeremy and he knew him by his height. The four, i.e. the accused, Jackline, PW2 and the deceased were at the scene at the material time. The accused was present when the deceased was being attacked. PW2 fled and left the deceased at the mercy of the accused and Jackline.

26. More convincing evidence was adduced by the IO and the Government Chemist. The IO obtained from the accused a jacket and a blue trouser which were blood-stained. The jacket and the trouser were sent to the government chemist whose report was that the blood on the blue trouser was of a female origin.

27. Whereas it is true that Pw2 had earlier been arrested over the death of the deceased, his credibility as a witness was not dented and he identified the accused to be the person in the company of Jackline at the time the deceased was killed. Overwhelming evidence and circumstances herein show that the deceased was attacked by Jackline and the accused and died of stab wounds. The circumstances of this case throw me to the subject of principal offenders. On this see section 20 of **Principal offenders**

#### **Section 20 of the Penal Code – Principal Offenders**

**(1) When an offence is committed, each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence, and may be charged with actually committing it, that is to say—**

**(a) every person who actually does the act or makes the omission which constitutes the offence;**

**(b) every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence;**

**(c) every person who aids or abets another person in committing the offence;**

**(d) any person who counsels or procures any other person to commit the offence,**

**and in the last-mentioned case he may be charged either with committing the offence or with counselling or procuring its commission.**

**(2) A conviction of counselling or procuring the commission of an offence entails the same consequences in all respects as a conviction of committing the offence.**

**(3) Any person who procures another to do or omit to do any act of such a nature that, if he had himself done the act or made the omission, the act or omission would have constituted an offence on his part is guilty of an offence of the same kind, and is liable to the same punishment, as if he had himself done the act or made the omission; and he may be charged with doing the act or making the omission.**

28. See also Republic v Mohammed Wanyoike & another [2017] eKLR on common intention and principal offenders;

**“The accused have raised the issue of common intention and that the deceased was assaulted by a mob. The 1st accused contends that if it is found that he was at the scene, then his presence was only passive and did not participate in the assault of the deceased. The mere fact that it was alleged by PW4 that the 1st accused was at the scene while holding a whip cannot be sufficient evidence to find him guilty of the offence.**

**Section 20 of the Penal Code provides for parties to an offence as well as principle offenders. A principle offender includes the one who commits the offence, the one who aides or abets another person to commit the offence and the one who procures the other person who commit the offence. Section 21 of the Penal Code provides as follows:-**

**“When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.”**

**Section 10 of the Evidence Act (Chapter 80 Laws of Kenya) states follows: -**

**“Where there is reasonable ground to believe that two or more persons have conspired together to commit an offence or an actionable wrong, anything said, done or written by any one of such persons in reference to their common intention, after the time when such intention was first entertained by any one of them, is a relevant fact as against each of the persons believed to be so conspiring, as well for the purpose of proving the existence of the conspiracy as for the purpose of showing that any**

such person was a party to it.”

The investigating officer testified that the deceased could have been killed by mob justice. Counsels for the accused reiterate that there were many people at the scene and it is difficult to determine who committed the offence. From the evidence on record, it is established that the deceased was assaulted during the day. PW2 was categorical that the mob did not attack the deceased. PW4 tried to assist the deceased but was threatened by the killers. That is the evidence on record. However, assuming that the deceased was assaulted by a mob of people and subsequently died out of those injuries, can it be said that the mob was justified in attacking the deceased. The concept of mob justice is nothing more than a group of people taking the law into their own hands. There is nothing justice in the unlawful acts committed by a mob. There is no principal of justice by the majority. The fact that the mob did not premeditate to commit the offence cannot be a good defence. Anyone who is part of the mob is duty bound to arrest the suspect and take him to court. Administering kicks and blows to the suspect in the pretext of mob justice does not make those acts lawful. The mob becomes the investigator, the trial court and the administer of the sentence. What is the extent of the punishment administered by the mob" One year, two years, life imprisonment or the death penalty. Such actions cannot be allowed in a country based on democracy and the rule of law. Every person within the mob who assaults the victim is individually liable for his/her criminal acts.

Common intention does not need to be foreplanned. It can be inferred from the acts of the perpetrators of the offence. In the case of NJOGU V REPUBLIC [2007] 2 KLR, 123, it was held inter alia that:

“Under section 21 of the Penal Code (Cap 63), when two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.”

In the case of LININGUSHU & OTHERS V REPUBLIC [2005] 1 E.A. 229, the deceased’s wife organized for the killing of her husband. Her defence was that she did not participate in the killing. The trial court summarized her role as follows: -

“She was the mastermind of the operation to eliminate her husband. She procured the killers and agreed to pay for their services. At the scene, she directed the operations although she did not strike the fatal blow. She paid part of the agreed price after the work was done. She was a principal offender and therefore guilty as charged.”

The Court of Appeal in the case of LININGUSHI & OTHERS (supra) agreed with the above findings and dismissed her appeal. In the current case, the 1st accused testified that his premises were broken into and his phone and money was stolen. It is clear from the evidence that he must have informed his friends about the incident. The 1st accused was told that the deceased was the one who broke into his premises. The 2nd accused managed to trace the deceased and according to PW2 called the 1st accused. They cornered the deceased and assaulted him. The 1st accused had a whip and inflicted injuries on the deceased. It does not matter whether the deceased died of the head injuries or the injuries inflicted by the whip. The 1st accused is a principle offender.

29. Principal offender includes the one who committed the actual act, one who abets or aids or omits to do something for purposes of aiding or abetting the commission of an offence. There is no other explanation as the deceased was left in the hands of Jackline and the accused and not long thereafter the deceased was found dead near her home. Evidence show that the deceased was a girlfriend of PW2 and Jackline was his wife. This is a case of love triangle and Jackline may have enlisted the help of the accused and the deceased died in their hands. In all, the accused was in the company of Jackline and even if he did not carry out the actual killing, he omitted to do something for purposes of aiding and abetting the commission of the crime. In that sense, he is a principal offender and may be convicted for the offence committed. I therefore find that the deceased died as a result of unlawful act or omission of the accused.

**Of Malice Aforethought**

30. The attendant love relationship of Jackline, pw2 and the deceased presented a perfect recipe to commit a felony, cause grievous bodily harm or death. The accused was aware of these facts and accompanied Jackline on an ominous mission. The deceased died of stab wounds of which a reasonable person would have knowledge that would cause grievous bodily harm or death. Any person in the position of the accused is said to have the necessary knowledge of these factors and hence constitutes malice aforethought to commit murder. I find the accused had malice aforethought in terms of section 206 of the Penal Code.

31 In conclusion therefore, I am satisfied that the evidence against the accused proves beyond any reasonable doubt that the accused is a principal offender in the murder of the deceased herein. And, I find him guilty of the murder of Rosemary Gacheri and convict him accordingly. Right of appeal 14 days.

Dated at Meru this 5<sup>th</sup> day of October 2019

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F. GIKONYO

JUDGE

Dated and delivered at Meru in open court this 7<sup>th</sup> day of October 2019

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**A. MABEYA**

**JUDGE**