



**REPUBLIC OF KENYA**

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

**HCCR NO. 93 OF 2017**

**FORMERLY MACHAKOS HCCRC. NO. 14 OF 2013**

**REPUBLIC.....PROSECUTION**

**-VERSUS-**

**PAUL MUTANGILI MATHENDU *alias* KIUNGUA.....ACCUSED**

**RULING**

1. **Paul Mutangili Mathendu *alias* Kiungua** the accused herein stands charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars are that the accused on 22<sup>nd</sup> day of March 2013, at Kyautaa village, Kitaingo sub location, Mukaa district within Makeni county murdered **Rachael Mwende Lova**.
2. The prosecution relied on the evidence of eight (8) witnesses to state its case. The brief facts are that the accused and deceased were known lovers and were even planning for a church wedding. The deceased ran a salon called "*Uvete salon work*". On 22<sup>nd</sup> March 2013, she left home for work at 8:00 am and was expected back at 7:00 pm but that was never to be.
3. She met her death not far from home. It was Pw4's evidence that he had seen the deceased as she left work on the fateful day carried on a motorbike. They greeted each other. Later she learnt of her murder.
4. On 22<sup>nd</sup> March 2013 at 7:00 pm, Pw3 **Rose Kavuli Wambua** heard the voice of a female person call her "*Mama Musila, mama Musila, come out.*" On going out near their toilet, she saw somebody lying down. On further checking she found it was the deceased. There was blood oozing from the side of the neck. There was no one at the scene. Her husband called the deceased's father (Pw1) who came.
5. Word spread round and soon people were gathered at the scene. The police came, worked at the scene and took away the body to the mortuary. Investigations started leading to the arrest of the accused.
6. From the evidence, there is no dispute about the death of the deceased person. Those who saw her body saw her bleeding from the neck. The postmortem examination revealed the cause of death to be a "***stab wound into the neck causing hemorrhage shock.***"
7. Having established the fact and cause of death, the next issue for determination is the *actus reus* i.e. the act of killing of the deceased and whether it is the accused who killed her. The investigating officer (Pw7) has given evidence on what made him charge the accused person. He mentions very good leads that made him conclude that it is the accused who killed the deceased.
8. Infact, he says that his star witness is **Pw4 James Kamau Kingoo**. That this witness told him that the accused always trailed the deceased through Pw4's phone. Further that on the fateful day the accused severally called him and around 7:00pm – 8:00 pm he again called and he informed him she had just been dropped. A few minutes thereafter he heard screams. As villagers screamed he saw the accused running away from the scene. He also saw him wearing boots, which he later recovered.
9. **Pw4 James Kamau Kingoo** testified before Pw6. He told the court that the accused had called him on 22<sup>nd</sup> March 2013 at 8:40 am. He asked him if he had seen the deceased passby. He answered in the negative. The accused told him he would passby that day to see her. From his evidence that was the only time he called her that day.
10. Secondly, he never said he saw the accused at any one time that day let alone at the scene. The evidence of Pw4 completely negates what Pw6 alleged as having been told by him. Even the boots he says were identified by Pw4 were never mentioned or identified by the said witness, before court.
11. **Pw2 Gitonga Kingoo** left his home walking at a place called Kwa Ngiti on 22<sup>nd</sup> March 2013, at 7:00 pm. He met the accused also

walking. On his way back he met the accused also coming from where he had gone. This time the accused was running. The direction the accused had been to heads to the scene of the murder. He asked the accused what the problem was but he never responded. He wore a brown leather jacket with a trouser.

12. Similar items though recovered by the Investigating officer (Pw6) from the accused's house and sent to the Government chemist for analysis were never identified in court by Pw2 as what he had seen the accused wearing that night. It's for that reason that they were never produced as exhibits before this court. This witness was also clear that as he met with the accused he did not see any blood on his clothes.

13. Pw6 said the boots he collected from the accused's house had blood droppings and black jack seeds which were also at the scene. He sent the jacket, knife, trouser and boots to the Government chemist for analysis. The report by Henry K. Sang and produced by Susan W. Ngugi clearly indicates that none of these items had blood stains. Since there were no blood stains no DNA profiling could be done. The report was produced as EXB 6a and exhibit memo EXB 6b.

14. Pw6 also stated that when him and others managed to trace the accused to his house they found him to be a worried man. He could not understand why. Did this disturbance in the accused denote his having killed the deceased? It was the duty of the prosecution to clearly bring out the evidence that linked the accused to this murder. There are many things that could have caused the disturbance in the accused from the deceased's death. She was his fiancée and were planning to get married.

15. It's Pw6 who said he had investigated and confirmed that indeed the church and family were preparing for the wedding of the two lovers. Could this incident in itself cause grief to the accused, assuming he was not involved? The answer is yes.

16. There is nowhere stated that indeed the items namely knife, trouser, and jacket had any blood stains when recovered by Pw6. One wonders why they were being taken for analysis.

Even the boots he claims to have had blood droppings were found to have no blood stains by the expert.

17. It is very unfortunate that the deceased had to meet such a cruel death without the perpetrator/perpetrators being brought to book. I find there to be no evidence connecting the accused to the said murder.

18. Placing the accused on his defence would amount to asking him to prove his innocence which is not the law. Were he to be placed on his defence and he elects to remain silent which is his right there would not be sufficient evidence to convict him. Suspicion however strong can never be the basis of a conviction. See **Sawe –vs- R (2003) eKLR**.

19. For my part, I find him not guilty and acquit him under section 306(1) Criminal Procedure Code. He shall be set free unless otherwise lawfully held under a separate warrant.

Orders accordingly.

**Delivered, signed & dated this 11<sup>th</sup> day of December 2019, in open Court at Makueni.**

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**H. I. Ong'udi**

**Judge**