



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**HIGH COURT CRIMINAL CASE NO 50 OF 2014**

**REPUBLIC .....PROSECUTOR**

**VERSUS**

**RODGERS KUTOSI ALIAS PAUL KUTOSI RODGERS.....ACCUSED**

**JUDGMENT**

1. The accused **RODGERS KUTOSI** alias **PAUL KUTOSI RODGERS** was charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code the particulars of which was that on the 5<sup>th</sup> day of June, 2014 at Gachika village Kiganjo location of Gatundu South Sub County within Kiambu County unlawfully murdered Lydia Mukimba.
2. He pleaded not guilty and to prove its case against him the Prosecution called a total of nine witnesses.

**PROSECUTION CASE**

3. It was the evidence of **PW1 John Makoli** who at that material time was living with the deceased as husband and wife that on 5/6/2014 while at his place of work a Lady known to him as “Mama Joseph” went to him and informed him that his wife had been stabbed with a knife. He proceeded to the scene where he found **PW4 John Napolo** holding the deceased who was very weak and her stomach tied with a shawl by the road side. He sought the assistance of his employer who gave him a motor vehicle to take the deceased to Gatundu District Hospital where she was announced dead on arrival. It was his evidence that PW4 told him that the deceased had called him and informed him that she had been stabbed by a boy she had ended a relationship with.

4. **PW2 Beatrice Nalifu** testified and confirmed that the accused had married the deceased. It was her testimony that the deceased who was her daughter, went back to her after some time and told her that she was having problems in her marriage to the accused who was very abusive and that the deceased stayed with her for some time before she decided to go and stay with her uncle. Sometimes in December, the accused approached her and indicated that he wanted to reconcile with the deceased who agreed to go back to him and in March, 2013 she went back to her with her child and had a cut on her thigh.

5. It was her further evidence that the deceased told her that the accused had locked her up in the house and she got cut while trying to escape. The deceased stayed with her for a period of two weeks before she went to live with her sister **PW3 Olivia Mukindia** who testified that the deceased lived with her for a period of one month before she moved in with PW1 into his house which was a distance of about five (5) minutes walk from her house. She stated that on 5/6/2014 at about 6.00 p.m. she was called on phone and told that the deceased had been stabbed with a knife and that she had told John Napolo PW4 that her

former husband, the accused, is the one who had stabbed her.

**6. PW4 John Napolo** stated that he was at his house at 6.30 p.m. when he heard a cry of a lady neighbour and he rushed to her house where he found her lying on her door step holding her stomach. The deceased informed him that she had been stabbed by her former husband the accused. It was his evidence that he was later joined by PW1 in taking the deceased to the hospital. Since he knew the accused, when the deceased gave him his name, they looked for him and was subsequently arrested in Mathare Area of Nairobi. PW4's evidence was corroborated by that of **PW5 Christin Wokoli** who testified that she met PW4 holding the deceased by the Road side taking her to the hospital. She removed her head scarf which they used to hold her intestines which had come out of the cut in her stomach. She called the brother in law of the deceased, her sister and PW1 her husband.

**7. PW6 John Buketi Simiyu** identified the body of the deceased to the doctor for the purpose of post mortem while **PW7, John Kuria Waithaka** confirmed having assisted with the motor vehicle which took the deceased to hospital. **PW8 Moses Busiku** confirmed having accompanied the accused to the home of the mother of the deceased when the same went to propose his marriage to the same. It was his evidence that on 5/6/2014 the accused approached him and requested him to take him to look for his wife having obtained a letter from the chief.

8. It was his evidence that he took the accused up to Gachika and the same told him to wait for him at a place while he was to proceed to the house and talk to the deceased first alone and if she agreed to accompany them he would then come with her. He waited for the accused for sometimes and when he went to check on him he saw him running towards the opposite direction and he decided to go back to his house. On 6<sup>th</sup> when he went to check on the accused he was arrested by the police who interrogated him and he confirmed that he knew the accused and had gone with him to Gachika. He further confirmed that he had no grudge against the accused who was his cousin.

**9. PW9 Sgt. Joseph Chepkok** confirmed having received the report on the killing of the deceased and subsequently carried out investigations. He produced the note as P.Exhibit No. 1 which was given to the accused by the chief to enable him go look for the deceased together with the post mortem report P.Exhibit No. 2 confirming the death of the same. He further testified that during the arrest the accused allegedly confessed and informed them that he had stabbed the deceased using a kitchen knife. It was his evidence that the said confession was recorded by Chief Inspector Kahanga.

## **DEFENCE CASE**

10. When put on his defence the accused gave unsworn statement in which he denied being involved in the death of the deceased whom he confirmed was living with him as a wife before she left him to go stay with her mother on 16/5/2014. It was his evidence that on 4/6/2014 his sisters in law came to visit him and left his child whom they said wanted to stay with him and that on 5/6/2014 the said child fell ill so he had to take him to the clinic. Since he was in a state of confusion as a result of the said illness, he decided to go to the deceased's mother house but did not find either the deceased or her mother but was told that the deceased had gone to Gachika. He confirmed having requested PW8 to take him to Gachika for the deceased, who advised him to get a letter from the chief before accompanying him. It was his evidence that PW8 left him at the place and he decided to follow him back so as to take his then sick child to his clinic and that he failed to call his mother in law but her cellphone was off. He further stated that on the 7<sup>th</sup> June 2014 he received a report that the chief was looking for him and since he had made a report to the same on his wife he thought that she had been found and when he went to the chief he was arrested and later on charged.

## **SUBMISSIONS**

11. At the close of the defence case the prosecution submitted that they had proved all the ingredients of the murder and that the accused placed himself at the scene. It was submitted that the deceased had separated with the accused and at that time was living with PW1. The accused conduct thereafter was that of a guilty mind since the same disappeared after the offence. The defence opted not to make any

final submissions.

## **ANALYSIS AND DETERMINATION**

12. The offence of murder is defined as follows:-

Section 203 of the Penal Code:-

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

For a conviction to be sustained the prosecution is therefore required in law to prove beyond any reasonable doubt the following ingredients:-

1. Proof of the fact and cause of death of the deceased.
2. Proof that the death resulted from and or was caused by unlawful act or omission on the part of the accused.
3. Proof that the said unlawful act or omission was caused with malice aforethought.

13. As regards the fact and the cause of death of the deceased, this has not been disputed. The deceased died as a result of stabbed wound to her lower abdomen and as per the post mortem report produced as P. exhibit 2, the cause of death was stated to be acute cardio pulmonary arrest due to massive blood loss and damage to the spleen. This evidence was corroborated in material particulars by the evidence of PW1, PW4, PW5, PW6 and PW7. PW9 the investigating officer confirmed having attended the post mortem examination on the body of the deceased and further the accused in his evidence before court confirmed that the deceased indeed died but stated that he did not know what had killed her. I therefore find that the deceased died on the material day and the cause of death is as per the post mortem report produced as P. exhibit No.2.

14. The next issue is whether the said death was caused by or as a result of an unlawful act on the part of the accused:- There is before me evidence of **PW4 JOHN (JONNY) NAPOLO** who was the first person to had responded to the deceased’s cry for help who testified on oath that the deceased told him that she had been attacked and stabbed by her former husband **PAUL KUTOSI** the accused person. There is also the evidence of **PW8 MOSES BUSIKU** who placed the accused at the scene of murder.

15. I further find as fact that the deceased made a valid dying declaration with sufficient clarity to **PW4 John Napolo** who stated that the deceased told him that she had been stabbed by her former husband Paul Kutosi. This information was given to PW5 Christin Wokoli at the time when she met PW4 taking the deceased to the clinic at a time when the witness did not know the accused and I therefore find no reason why he would have made up the said story having been the last person the deceased talked to before her death. I find that the statement made to PW4 by the deceased falls within the meaning of **Section 33(a)** of the **Evidence Act Cap 8** Laws of Kenya which was corroborated by the evidence of PW8.

16. The evidence of PW8 is further corroborated in material particulars by a letter issued to the accused by the Assistant Chief of Gacharage dated 5/6/2014 the date of the murder to be assisted in looking for the deceased. Whereas there is no eye witness who saw the accused stab the deceased there are enough circumstantial evidence produced before me which conclusively links the accused to the commission of the offence including the evidence of PW8 who was with the accused at the scene and the fact that he saw the accused running to the opposite direction from the place where the deceased was attacked. There is the letter from the chief recovered from the accused confirming that on the material date he was looking for the deceased.

17. I have further taken into account the evidence of PW9 which was not controverted to the effect that upon his arrest having been escorted to the police station by a relative, the accused made a confession to

Chief Inspector Kahange to the effect that he had stabbed the deceased using a kitchen knife against the accused defence herein and find that the death of deceased was caused by unlawful act on the part of the accused.

18. The final issue for determination is whether the said unlawful act was caused by malice aforethought on the part of the accused person:- Under Section 206 of the Penal Code the prosecution is under a duty to prove that the accused had the intention to cause the death of the deceased or that he had knowledge that his act or omission would probably cause the death of the deceased person.

19. In his defence the accused stated that he had stayed with the deceased as husband and wife for three months having met the mother of the deceased and the elders before she left him and that on the 5/6/2014 when it is alleged that he had killed the deceased he had taken his sick child to the clinic and thereafter decided to go and look for the deceased at her mother's place but did not find her having been told that she had gone to Gachika. It is then when he decided to get PW8 to take him to the place and that when he went to the said place he did not find the deceased but only found a ten year old child. He went back to the place where he had left PW8 but did not find him so he decided to go back to take his sick child to the clinic. This evidence is contradicted in material particulars by the evidence of PW8 and PW9 the investigating officer.

20. There is evidence produced before the court which stands unchallenged that the deceased had left the accused and was at the material time living with PW1. There is evidence on record that on the material date the accused approached PW8 and requested him to escort him to Gachika to look for his wife and that the accused came back to him with a letter from the assistant chief P.Exhbit No. 1 confirming that on the material day the accused was looking for his wife, the deceased.

21. Both PW4 and PW8 put the accused person at the scene of murder and the accused person in his defence confirmed that he was indeed at the said area at the time of alleged murder. The deceased before her death confirmed to PW4 that she was stabbed by her former husband. It is clear that the accused had purposed in his mind to get the deceased back to himself and killed her in the process of the said mission. The degree of the injuries inflicted upon the deceased clearly reflect an intention on the part of the accused to kill or maim the deceased who died as a result of the said injuries. The attack meted upon the deceased was savage and I find that it falls within the definition of *mens rea* in **Section 206** of the **Penal Code**.

22. Further the conduct of the accused immediately upon the commission of the offence of running away and leaving PW8 at the place and going to Pangani in Nairobi where a relative of his escorted him to Gatundu police station where he was arrested confirmed the same had a guilty mind. I have looked at the accused defence and whereas the burden is upon the prosecution, I find and hold that the accused defence is unbelievable taking into account his testimony on how he was arrested and how P.Exhbit 1 was recovered from him against the prosecution evidence. It is clear to my mind and I find that the accused had intention to kill the deceased if she was not willing to go back to him and indeed succeeded in so doing.

23. I therefore find and hold that the prosecution has proved beyond reasonable doubt its case against the accused person and hereby find the same guilty and convict him of the murder of LYDIA MUKIMBA on 5/6/2014 at Gachika village in Gatundu within Kiambu County.

**DATED, SIGNED and DELIVERED at Nairobi this 7<sup>th</sup> day of March, 2017.**

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**J. WAKIAGA**

**JUDGE**

**In the presence of:-**

*Miss Mwaniki for the State*

*Mr. Ndung'u for the Accused*

*Accused – present*

*Tabitha - court clerk*