



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

HCR NO. 15 OF 2019

REPUBLIC.....PROSECUTOR

VERSEUS

GEOFFREY KUNDU KAKAI.....1ST ACCUSED

LENAH CHEPTEEK KAPCHANGA.....2ND ACCUSED

J U D G M E N T

The accused **GEOFFREY KUNDU KAKAI** (accused 1) and **LENAH CHEPTEEK KIPCHANGA** (accused 2) are jointly charged with offence of murder contrary to Section 203 as read with Section 204 of the Penal Code.

The particulars of the offence are that **GEOFFREY KUNDU KAKAI SIMIYU** (accused 1) and **LENAH CHEPTEEK KIPCHANGA** (accused 2) on the night of 16th and 17th March, 2019 at Cheptarir village of Changenywo location within Bungoma County murdered **SIMON NDAMWE WALUKANA**.

The case for Prosecution is that accused 1 Geoffrey Kundu Kakai is the husband of accused 2 Lenah Chepteek Kipchonga. On 16.3.2019 at night PW2 Titus Muchangaa Wekesa the brother of accused was from a funeral going home when he heard screams of Mwizi Mwizi (thief, thief) from the home of accused 1. He went there. He found accused 1 and accused 2 present. He found the deceased seated and had injuries on the face. He advised accused 1 to go and inform the village elder Dickson Wanali who came. The deceased told the witness that he was only passing when he was attacked.

PW5 Dickson Mamati Wetunya the village elder was asleep in his house when he heard screams. Geoffrey (accused 1) then went to him and informed him that he had found a person at his home and hit him with a hoe. He went with accused 1 to his home where he found then deceased who had injuries on the head. The deceased was tied next to a cow. He asked accused 1 to untie him. The next day he received information that the deceased had been found dead on his farm. He informed a police who came and took away the body.

PW4 Justus Wamalwa Lukhano a village elder visited the scene with another village elder. Josphat visited the home of accused 1. On arrival he asked accused 1 where the cow alleged to have been stolen was. He showed them. He informed them that the other village elder Dickson had released the suspect. Accused 2 brought clothes allegedly belonging to the deceased. They found him dead in his farm. He confirmed that the accused 1 had alleged the deceased was found in the act of stealing accused's 1 cow.

PW3 Meshack Wanjala the son of the deceased testified that on 16.3.2019 at 10 p.m. Victor Kundu the son of accused 1 came and called his father the deceased telling him that accused 1 was calling him. Deceased went with Victor. After a short time, he heard screams from the home of accused that there was a cattle thief. They received information deceased was at the river. They went there and found the deceased with injuries. Deceased told them accused 1 had injured him.

He confirmed that their home is about 200 meters from home of deceased.

PW9 NO. 111245 PC John Maitha Karisa the Investigating Officer at Changei location was instructed by OCS to proceed to the scene. At the scene he found the body of deceased which had injuries on the head. They followed blood stains which led them to the home of accused. They found accused present. They found the shoes of the deceased and a jembe which was blood stained. From the scene they also recovered blood stains soil. Accused alleged that accused had stolen their cow and that they had a long standing grudge. They arrested accused who were later charged with present offence.

The accused upon being placed on their defence gave sworn evidence.

Accused 1 Geoffrey Kundu Kakai testified that he knew the deceased. On night of 16-17th March 2019 he was asleep when he had a cow's calf making noise outside. He peeped through the window and saw the cow missing. He also noticed that the door was bolted from outside.

He raised an alarm and a person opened for him. He went towards where he saw people at the lower part of his farm. He ran there and found people had arrested the deceased. He went back to his home and found the cow and tied it. They released the deceased. He went back to sleep and at 5 a.m. he heard people screaming that deceased had died. At 8 a.m. police officer came and he informed them that while it is true they had raised the alarm, he did not know the people who assaulted the deceased.

On being cross-examined by M/s Makungu for state he admitted he raised the alarm and that when he went out he found the deceased had been beaten but the cow was not where the deceased was.

Accused 2 Lenah Chepteek Kipchanga the wife of accused 1 testified that she was asleep with accused 1 when they heard the calf making noise. Accused 1 tried to get out but found the door locked from outside. When it was finally unlocked they went out and found deceased had been beaten and was being taken towards the river. They asked that he be released as he is not a thief but only disturbs people at night. They went back to sleep and next day were informed that deceased had died. She denied that she had any romantic relationship with the deceased.

On being cross-examined by M/s Makhungu for state she stated that she had known deceased since 1990 as a neighbor and that he was not known for being a thief but they walk at night disturbing people.

M/s Wakoli for accused filed written submissions. Counsel submitted that none of the prosecution witnesses testified that they saw any of the accused inflict injuries on the deceased. Counsel submits that the only evidence tendered is that accused noticed their cow missing, raised an alarm, neighbours came and apprehended deceased. When accused went out they found deceased already injured and they directed him be released. The deceased later died from injuries sustained during that night.

Further and in the alternative counsel submit that if it is accused who inflicted injuries, it was as a result of provocation and that the defence is an absolute defence and accused should be acquitted.

The accused are charged with the offence of murder contrary Section 203 as read with Section 204 of the Penal Code.

This Section provides:

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

Malice aforethought is deemed to be established by evidence proving any one of the following circumstances.

Section 206:

(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 happen.

(c) an intent to commit a felony.

(d) an intention by the act or omission to facilitate the flight or escape from custody or any person who has committed or attempted to commit a felony.

From these provisions for an offence of murder the prosecution must prove that it is the accused who inflicted the injuries on the deceased. The deceased died from the said injuries and that the accused had the necessary intention to cause death or grievous harm at the time of inflicting the injuries.

The fact and cause of death was proved by the evidence of **PW1. Dr. Nyongesa Kere** who performed the post mortem on body of the deceased. He found that deceased had 3 defensive wounds on left hand cut wounds on fore-arm fracture on left leg, a cut wound on the head and brain bleeding. He formed opinion that cause of death was due to critical head injury due to multiple cuts.

Who inflicted the injuries on the deceased?

PW2 Titus Mutanga Wekesa testified that when he arrived at the scene, he found the deceased already had the injuries. **PW3 Meshack Wanjala** testified that she found the deceased at the river having already been injured. **PW4 Justus Wamalwa** only received from the accused 1, the deceased clothes and shoes but did not see when he was being beaten. **PW5 Dickson Mamati** on arrival found deceased having been assaulted and was unable to speak. **PW6 Titus Mutati** the chairman of Nyumba kumi arrived at home of accused 1 who gave him clothes belonging to the deceased.

None of these prosecution witnesses called testified that he saw either accused 1 or 2 inflicting the injuries on the deceased. However, **PW2 Titus Muthanga Wekesa** testified.

“Remember on night of 16.3.2019 we had left a funeral and was at my home. I heard screams from the home of my brother Geoffrey. They were shouting “Mwizi Mwizi.” Geoffrey is accused 1. I went there and found the deceased. Accused 1 was with his wife accused 2 present. The deceased had injuries and was seated. He hid injuries on the face. I asked accused 1 to go and all the

village elder. I asked deceased why he does to the home of accused 1. Accused 1 called the village elder Dickson Wamati who came. I went to my house and slept.”

PW5 Dickson Mumati Werunga also testified thus. “ On 17.3.2019 at 1 a.m. I was in my house asleep. I heard screams hat a person had died. I came out and met Geoffrey Kundu my nephew. He told me he had found a person at his home and hit him with a hoe. I went with him to his home. At the home I saw Simon Ndamwe. He had injuries on the head. Simon comes from Mt. Elgon. He was also tied next to a cow. I asked Geoffrey to untie him. I then went home”.

PW9 Eliud Kitalamu the Chief of Tungalwa location testified.

“I went to the home of Kundu and I found him with wife and other people. Kundu said he had found accused having untied his cattle and was driving them away. Near where the cattle was there were blood stains. There was also a broken stick. I called the OCS. DCI officers from Cheptais came. These are the shoes MF12 AB Jacket MF1 2, Jembe head MF1 5, broken jembe stick MF1 6. All were taken by the officers at the scene”.

All these witnesses testified that the accused 1 informed them that the deceased had attempted to steal his cow and accused 1 had hit him. The accused in his defence admitted that he noticed his cow had gone missing, he came out and found deceased at his home and assaulted him. He gave the same information not to one witness but all the witnesses who went to his home. His brother Titus Muthanga (PW2) also testified that he had had found accused with deceased and advised accused to call the village elder. From the evidence of PW2 Titus PW5 Dickson and PW9 Eliud. I am satisfied that the accused 1 did inform them that he is the one who assaulted the deceased whom he had found at his home trying to steal his cow. I am therefore satisfied that accused 1 is the one who inflicted the injuries from which the deceased died.

The accused 1 told the prosecution witnesses including the brother and the chief that he assaulted the deceased when he came out and found deceased in accused home at night and trying to steal his vow. In short he was pleading the defence of provocation in that he was provoked when he found the deceased in committing a wrongful act of stealing his cow.

The defence of provocation is defined under Section 207 and 208 of the Penal Code as follows:

Section 208(1) – The term “provocation” means and includes except as herein after stated, any wrongful act or insult of such a nature as to be likely, when done to an ordinary person of in the presence of an ordinary person to another who is under his immediate care, or to whom he stands in a conjugal, parental, filial or fraternal relation, or in the relation of master or servant, to deprive him of the power of self control and to induce him to commit an assault of the kind which the person charged committed upon the person by whom the act or insult is some or offered.

(2) when such an act or insult is one or offered by one person to another, or in the presence of another to a person who is under the immediate care of that other, or to whom the latter stands in any such relation as aforesaid, the former is said to give the latter provocation for an assault.”

From the evidence it is not in dispute that the deceased was at the house of accused 1 on the material day at 11 p.m. It is not in dispute that there was a cow which had been removed from the calf which made noise attracting the attention of the accused 1. On going out he found deceased with the co w which had been removed from where it had been tied to. These two acts taken together would to an ordinary person in the positon of accused 1 deprive him power of self-control thus provoking him to assault the deceased.

Where from the evidence, it has been established that the accused was provoked to assault the deceased, Section 207 provides as follows:

Section 207:

When a person who unlawfully kills another under circumstances which, but for the provisions of this section, would constitute murder, does the act which causes death in the heat of passion caused by sudden provocation as hereinafter defined, and before there is time for his passion to cool, is guilty of manslaughter only.

As for accused 2, Lenah Chepteek Kipchanga upon considering all the evidence, I do not find that the prosecution has proved any of the ingredients of murder against her. Her only role is that she was present when the accused was assaulting the deceased being a wife of the accused. That is not sufficient evidence to connect her with the murder. I therefore find accused 2 Lenah Chepteek Kipchanga NOT guilty and acquit her under Section 215. Accused 2 Lenah Chepteek be released unless otherwise lawfully detained.

As for accused 1 Goeffrey Kundu Kakai, I find that he inflicted the injuries on deceased while under provocation and by the provisions of Section 207 Penal Code find him guilty of the offence of manslaughter contrary Section 202 as read with Section 205 of the Penal Code and convict him accordingly.

DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 27TH OF JANUARY, 2022.

S.N RIECHI

JUDGE