REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL CASE NO. 1 OF 2014

REPUBLIC.....PROSECUTOR

VERSUS

JENNIFER CHEPKORIR KIMOI.....ACCUSED

JUDGMENT

[1] The accused person, **Jennifer Chepkorir Kimoi**, was charged with the offence of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code, Chapter 63** of the **Laws of Kenya**. It was alleged by the Prosecution that on the **5th day of January 2014** at Gitau Farm Village, Kipkabus Location in Eldoret East District within Uasin Gishu County, she murdered **BC.** The accused denied that charge, whereupon the Prosecution called 8 witnesses in proof thereof; and here below is a summary of their evidence.

[2] Wilson Cheruiyot Chebii (PW1), the father of the deceased testified on **23 January 2019** as the first Prosecution witness. His evidence was that, at about 2.00 p.m. on **4 January 2014**, he was at his farm when he received a call from the Village Elder, **William Tarus (PW4** herein), requiring him to go home as a matter of urgency. He immediately went home and was there told that his daughter, **C,** had died; and that her dead body had been found in the house of the accused person. He then proceeded to the scene and found the dead body of his daughter lying on the floor, covered with a blanket. He noted that there was some blood on the legs and some ash had been sprinkled on the floor around the body. He further stated that, as the Police were already at the scene, they took away the body after he confirmed the identity of the deceased.

[3] PW1 explained in cross-examination that the deceased left home on a Saturday in the company of her brother, **Elijah Kibiwott,** to go to their uncle's place, about 3 km away, to assist their uncle with his maize harvest. According to **PW1**, the deceased was in good health. He added that she was then a student at Keidi Secondary School and was aged 17 years at the time of her death.

[4] The second Prosecution witness was **KK (PW2),** a juvenile aged about 14 years. He told the Court that he was a pupil at [Particulars withheld] Primary School as at **23 January 2019** when he testified. His testimony was that, on the morning of **5 January 2014** at about 9.00 a.m., he was sent by his mother, **MK**, to go and collect a basin from the accused who was also known by the nickname **Brownie. PW2** further told the Court that, since he did not find the accused at home, he was hesitant until a neighbour of the accused encouraged him to feel free to enter the house and take whatever he required. He further stated that, upon entering the house, he found somebody lying on the floor, covered with a blanket. He did not check to see who the person was or what may have happened to the person. **PW2** added that he left the house immediately; and without the basin he had been sent to collect. That after informing the accused's neighbor that he had found somebody lying on the floor inside the accused's house, he went back home.

[5] Rose Kipkoskei Kipsang (PW3), a resident of Kipkabus told the Court that she was at home on **5 January 2014** at about 10.00 a.m. when her neighbor, **Dorcas,** visited her and informed her that there was a dead body in the house of the accused; and that she had received the information from **PW2. PW3** stated that he advised **Dorcas** to report the matter to the village elder; and that she then accompanied **Dorcas** and together they reported the matter to the village elder and thereafter accompanied the village elder, **William Kipkoech Mandago (PW6)** to the scene. **PW3** made it clear that she did not enter the accused's house to view the body. She also conceded that she did not know what caused the death of the deceased.

[6] William Tarus testified as **PW4** and told the Court that, in his capacity as a village elder, he received a report via telephone at about 12.00 noon on **5 January 2014** of a murder incident that had occurred in the neighbouring village; and that he thereafter got to learn that the victim was a daughter to his neighbour. He then proceeded to the scene where members of the public had gathered. He opened the door and viewed the body and identified it to be that of his neighbour's daughter. He also got to learn that the house in question belonged to **Jennifer**, the accused person herein. As the accused person was not at home, he went out in search of her and found her working at a friend's house. **PW4** further stated that he caused the accused to accompany him to Kipkabus Police Post and handed her over to the police.

[7] In cross-examination, **PW4** confirmed that the deceased was well known to him; and that she was a student at the time of her demise. He however denied any knowledge that she was pregnant at the time; or that she died while procuring abortion.

[8] Jackson Chasava Nari (PW5) told the Court that he was then working as a *"boda boda"* operator; and that at about 12.00 noon on **5 January 2014,** he received a telephone call from an unknown caller who required his services. He confirmed that he responded to the call and proceeded to Gitau Farm in Kipkabus where he found a gathering of members of the public. He got to learn that there was a dead body of a girl lying on the floor of one of the houses; and that on a closer look, he recognized the body to be of a person well known to him as **C**. He was then instructed by the village elder, to take him in search of the accused person, in whose house the dead body had been found. He likewise confirmed that the accused was also well known to him as **Jennifer**; and that upon finding her, the village elder caused her to be taken to Kipkabus Police Post.

[9] The area village elder, **William Kipkoech Mandago (PW6),** also gave evidence on **23 January 2019**. He told the Court how, at about 10.00 a.m. on **5 January 2014,** he received a report from some women, while at the local centre, to the effect that there was a dead body lying in the house of **Jennifer**. He added that he promptly acted on the report by accompanying the women to the scene where he indeed found the dead body of the deceased herein lying on the floor of the accused's house. He further told the Court that the accused was not at home; and that he consequently went to the nearby police station and reported the incident. Thereafter, police officers went to the scene and collected the body from the house of the accused person. He conceded in cross-examination that the report he received was that the deceased had died while procuring an abortion.

[10] Dr. David Chumba (PW7), a Pathologist based at Moi University School of Medicine, testified that he performed an autopsy on the body of the deceased, **BC,** on the **9 January 2014**; and that upon examining the body he found that there was a rapture of the external genitalia going through the bladder up to the abdomen; and the uterus contained a dead female foetus which was about 5 months old. He added that the body of the deceased was bloodless. He thus formed the opinion that the cause of death of the deceased was severe haemorrhage due to attempted abortion by a blunt object. He produced the Postmortem Form that he filled and signed as **the Prosecution's Exhibit 1** herein.

[11] The last witness, **PC (W) Nancy Makokha (PW8),** testified on behalf of the Investigating officer, **Sgt. Wafula**, to the effect that the accused was handed over to **Sgt. Wafula** on **5 January 2014** on allegations that she had helped procure an abortion for the deceased, who died in the process, while in the house of the accused person. According to her, she received the file while the matter was pending before court and that her role was limited to ensuring the witnesses were bonded to attend court.

[12] Upon being placed on her defence, the accused told the Court that she left her house on the afternoon of **4 January 2014** to attend a circumcision ceremony in Tumeiyo. She explained that, though they had agreed with one of her neighbours, **Dorcas Jebiwott**, to attend the function together, **Dorcas** was unable to make it, having received visitors at the last minute. The accused also mentioned that she went to the house of **Dorcas** and saw the visitors and realized that they were persons well- known to her. They included the deceased, **Bentine**, her sister, **Charity** and mother, **Christine**. The accused further told the Court that **Christine** confident in her and told her that her daughter **Bentine** was pregnant and that if her father got to know of it, she would be killed. She added that she got to know that **Christine** had come to seek the help of **Dorcas** to procure an abortion for **Bentine,** who was still a student. The accused also mentioned that it was within her knowledge that **Dorcas** was midwife; and that she would also treat children and their mothers using traditional herbs.

[13] According to the accused person, it was at that juncture that he left for Tumeiyo, from where she was arrested the following day on **5 January 2014**. She denied that she had anything to do with the death of the deceased; and explained that she only left her door open for the sake of her chicken; for which she handed over her keys to her neighbour **Dorcas Jebiwott**. The accused called her husband, **William Kimeli Kipruto** and **Francis Kipkoech Kipketer (DW3)** as her witnesses, to corroborate her *alibi* that she was at the circumcision ceremony at **DW3'**s home on the night of **4th and 5th January 2014** and therefore could not have procured or participated in the attempted abortion involving the deceased.

[14] The foregoing being the summary of the evidence, the Court must now determine whether the Prosecution has discharged the burden of proving its case to the requisite standard. In his closing submissions, filed herein on **2 March 2021**, **Mr. Miyienda**, learned counsel for the accused, adopted his earlier submissions on no case to answer dated **21 August 2019,** wherein he had taken the posturing that the Prosecution had failed to prove its case to the requisite standard. He had taken issue with the fact that no eye witness was availed by the Prosecution to either link the accused with the death of the deceased or to demonstrate that she had anything to do with the act of assisting the deceased to procure an abortion.

[15] Mr. Miyienda further urged the Court to note that the Prosecution called witnesses in a selective manner, and therefore deliberately failed to call a number of crucial witnesses, such as the mother and sisters of the deceased who were with her at the material time. He particularly pointed out that **Dorcas**, who was mentioned by **PW2**, was not called as witnesses in spite of the pertinent role she played. Counsel accordingly urged the Court to draw an inference that those witnesses who were omitted must be the individuals who participated in the criminal acts leading to the death of the deceased.

[16] In his final submissions, **Mr. Miyienda** urged the Court to take into consideration the evidence presented by the accused and her two witnesses; and to find that the Prosecution failed to controvert the account presented by the accused in her defence. He reiterating his stance that an adverse inference ought to be drawn from the fact that the Prosecution failed to call crucial witnesses such as **Dorcas**, as well as the mother and sisters of the deceased who were named by some of the Prosecution witnesses. More importantly, it was the submission of **Mr. Miyienda** that the Prosecution had failed to prove that the accused had the motive to commit murder in the manner alleged herein. He accordingly urged for her acquittal of the charge levelled against her.

[17] Section 203 of the **Penal Code**, **Chapter 63** of the **Laws of Kenya,** pursuant to which the Information herein was filed, provides that:

> **"any person who, of malice aforethought, causes the death of another person by an unlawful act or omission is guilty of murder.**

[18] Thus, the key elements of the charge that the Prosecution needed to prove are: the fact of death; that the death was caused by the accused by an unlawful act; and malice aforethought on the part of the accused person. In **Republic vs. Andrew Omwenga [2009] eKLR,**

the provision was given consideration thus:

> **"...for an accused person to be convicted of murder, it must be proved that he caused the death of the deceased with malice aforethought by an unlawful act or omission. There are therefore three ingredients of murder which the prosecution must prove beyond reasonable doubt in order to secure a conviction. They are:-**
>
> **(a) The death of the deceased and the cause of that death.**
>
> **(b) That the accused committed the unlawful act which caused the death of the deceased and that the accused had malice aforethought."**

[19] There is no dispute that the deceased, **BC**, died on **4 January 2014**. Credible evidence in this regard was adduced by her father, **PW1** who told the Court that the deceased was aged 17 years at the time of her demise and that she was a secondary student. **PW1** further testified that the deceased was in good health when she left home for her uncle's home in the company of her brother, **Elijah Kibiwott**. The Prosecution further availed evidence to prove that the dead body of the deceased was found on the morning of **5 January 2014** lying on the floor of the accused's house. The first person to see the body was **PW2**, and on the basis of the report he gave, the incident got to be known by the neighbours of the accused person **(PW3** and **PW5),** as well as the village elders of both Gitau Farm where the incident occurred **(PW6)** and the neighbouring village of Samabul **(PW4).** In turn, **PW6** immediately brought the matter to the attention of the police at Kipkabus Police Post.

[20] PC (W) Nancy Makokha (PW8) confirmed that, upon the incident being brought to the attention of the police, investigations were instituted by **Sgt. Wafula** of Kaptagat Police Station on **5 January 2014**; and that arrangements were made for postmortem examination to be carried out to ascertain the cause of the deceased's death. **Dr. David Chumba (PW7)** who conducted the autopsy testified herein on **14 May 2019** and told the Court that he conducted the exercise on **9 January 2014** at Moi Teaching and Referral Hospital and that his findings were that there was a rapture of the external genitalia that went through the bladder up to the abdomen; and that the deceased's uterus contained a dead female foetus which was about 5 months old. He observed that the cervix was not damaged; and that the deceased's body was bloodless. His opinion from the observations he made was that the deceased died of severe haemorrhage due to attempted abortion by a blunt object. Clearly, therefore, the first element of the charge, namely the death of the deceased, **BC,** was proved by the Prosecution beyond reasonable doubt; and I so find.

[21] The next issue to consider is whether the death was caused by the accused; and if so whether it was attributable to an unlawful act. The account presented before the Court by **PW3, PW4, PW5** and **PW6** was that the deceased "may have" gone to the house of the accused for the purpose of procuring an abortion. No direct evidence in this regard was given, noting that neither the deceased's brother, **Elijah Kibiwott**, nor her uncle **Joseph Kiprono**, who would have been best placed to give evidence as to the deceased's movements prior to her death, were never called to testify herein. Nevertheless, the unchallenged evidence of **PW5** is instructive. His opinion was that the cause of death of the deceased was severe haemorrhage due to attempted abortion. This, taken alongside the evidence of **PW1, PW2, PW3, PW4, PW5** and **PW6** that the body was found lying supine on the floor in a pool of blood; and that an attempt had been made to cover the blood with ash, prove beyond reasonable doubt that the deceased died in the course of an attempted abortion, which is indeed an unlawful act from the standpoint of **Sections 158 and 160** of the **Penal Code.**

[22] Having so found, the question to pose is whether the attempted abortion was the work of the accused person. Again, there is no direct evidence, such as of an eye witness to the act itself. Thus, the Prosecution relied heavily on the indubitable fact that the dead body of the deceased was found in the accused's house. That, of itself, amounts to circumstantial evidence; and it is now trite that for the Court to found a conviction on such evidence it must be strong enough to rule out all other reasonable explanations and point irresistibly to the guilt of the person accused. This was well-explicated in **R. vs. Kipkering Arap Koske & Another [1949] 16 EACA 135 by** the Court of Appeal for Eastern Africa thus:

> ***"In order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is on the prosecution, and always remains with the prosecution. It is a burden which never shifts to the party accused."***

[23] Thus, in **Musili Tulo vs. Republic [2014] eKLR,** the Court of Appeal explained that in order to sustain a conviction, such evidence must satisfy the following requirements:

> ***(a) The circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;***
>
> ***(b) Those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;***
>
> ***(c) 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.***

[24] The accused person did not dispute that the body of **BC** was found in her house. She however denied any knowledge of how that came to be; or the cause of the deceased's death. In her defence, she explained that she had been invited to attend a circumcision ceremony along with her neighbour **Dorcas Jepleting**; and that as they were about to leave, **Dorcas** received some guests and was, consequently, unable to accompany her to the ceremony. She added that she then decided to leave the door to her house open for the sake of her chicken and asked Dorcas to lock it up later after the chicken had gone in.

[25] The accused further told the Court that, before she left for the circumcision ceremony, she had occasion to meet the guests that **Dorcas** had received; and that she identified them to be **Christine Cheruiyot, Charity Cheptum** and the deceased, **BC;** persons well known to her

before that date. She also mentioned that **Christine** is the wife of **Wilson Cheruiyot, PW1** herein; and that **Charity and Bentine** were their daughters. More importantly, the accused told the Court that **Dorcas** is a midwife and that she would treat children and mothers using traditional herbs; and that **Christine** confided in her about **Bentine's** pregnancy and that they had gone to **Dorcas** for the purpose of procuring abortion.

[26] The Prosecution had the opportunity to call **Dorcas Jepleting** as a witness, noting that her name featured prominently in the evidence of **PW2** and **PW3,** but opted not to. Several other individuals who appear to have had contact with the deceased shortly before her demise were, likewise, not called to testify. The deceased's father, **PW1,** mentioned that the deceased had left home in the company of her brother, **Elijah Kibiwott.** He was not called as a witness and no explanation was given for the omission. The deceased's uncle, whose name was given by **PW1** as **Joseph Kiprono**, was also not called to testify as to whether the two went to his home as anticipated.

[27] Although the Prosecution was not obliged to call a superfluity of witnesses, it is a requirement of **Section 143** of the **Evidence Act, Chapter 80** of the **Laws of Kenya**, that it calls such witnesses as are sufficient to establish the charge beyond reasonable doubt; and where, as in this case, crucial witnesses are not called to testify, the presumption that, had the witnesses been called, their evidence would have been adverse to the Prosecution, would apply. Thus, in **Bukenya & Others vs. Uganda** [1972] EA 549, it was held that*:*

> **"The prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent.**
>
> **Where the evidence called is barely adequate, the Court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution."**

[28] The principle was restated by the Court of Appeal in **Sahali Omar vs. Republic [2017] eKLR** thus:

> **"The principle used to determine the consequences of failure to call witnesses was succinctly stated in Bukenya & Others v Uganda (1972 E.A; where the court held that: -**
>
> > **i. "The prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent.**
> >
> > **ii. That court has the right and duty to call witnesses whose evidence appears essential to the just decision of the case.**
> >
> > **iii. Where the evidence called is barely adequate, the court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution."**
>
> **The prosecution reserves the right to decide which witness to call. Should it fail to call witnesses otherwise crucial to the case, then the court has the mandate to summon those witnesses. But should the said witnesses fail to testify and the hitherto adduced evidence turn out to be insufficient, only then shall the court draw an adverse inference against the prosecution. This is because the prosecution is not obliged to call a superfluity of witnesses, but only such witnesses as are sufficient to establish the charge beyond any reasonable doubt."**

[29] Hence, effect of the omission is that the defence offered by the accused does present a reasonable hypothesis that the attempted abortion could well have been procured by **Dorcas**; and that **Dorcas** may have placed the body of the deceased on the floor of the accused's house in her absence.

[30] It is also significant that, although the accused's counsel, **Mr. Miyienda,** gave notice of the line of defence the accused would present through his cross-examination, no action was taken by the Prosecution to rule out the possibility that the deceased's own mother and sisters were involved in her attempted abortion; and that, in those circumstances, they were best placed to identify the culprit. Neither the deceased's mother nor her sisters were called to testify herein. Needless to restate that the burden was on the Prosecution to rule out all other reasonable hypotheses surrounding the death of the deceased; and as matters stand, the version offered by the accused, having not been displaced, is tenable.

[31] In addition to the foregoing, the accused presented an alibi and stated that she left her house at about 3.00 p.m. on **4 January 2014**; and therefore had no opportunity to commit the crime. She called her husband, **William Kimeti Kipruto (DW2)** and **Francis Kipkoech Kipketer (DW3)** in proof of her assertion that she was away attending a circumcision ceremony at the home of **DW3**. Both told the Court that the accused was with them throughout that night; and that the home of **DW3** is about 6 km away from the accused's house; and therefore that the accused could not have been in the two places on the same night. Again, it was the duty of the Prosecution to displace that alibi, which it did not. In **Kiarie vs. Republic** [1984] eKLR, the Court of Appeal had the following to say in this regard:

> **"An *alibi* raises a specific defence and an accused person who puts forward an *alibi* as an answer to a charge does not in law thereby assume any burden of proving that answer and it is sufficient if an *alibi* introduces into the mind of the court a doubt that is not unreasonable…"**

[32] Similarly, in **Athuman Salim Athuman vs. Republic** [2016] eKLR, the Court of Appeal held that:

> **"It is trite that by setting up an *alibi* defence, the appellant did not assume the burden of proving its truth, so as to raise a doubt in the prosecution case...The burden to disprove the *alibi* and prove the appellant's guilt lay throughout on the prosecution...the purpose of the defence of *alibi* is to account for so much of the time of the transaction in question as to**

render it impossible for the accused person to have committed the imputed act...”

[33] It is instructive that in **Section 309** of the **Criminal Procedure Code**, it is provided that:

> **“If the accused person adduces evidence in his defence introducing new matter which the advocate for the prosecution could not by the exercise of reasonable diligence have foreseen, the court may allow the advocate for the prosecution to adduce evidence in reply to rebut it.”**

[34] Thus, even assuming that the accused raised her *alibi* for the first time in her statement of defence, nothing stopped the Prosecution from availing itself of the opportunity to disprove the same under the provision of law aforestated. Thus, in **Joseph Waiguru Wang’ombe vs. Republic** [1980] eKLR the Court of Appeal expressed the view that:

> **“The defence of *alibi* was put forward for the first time some four months after the robbery when the appellant made his unsworn statement in Court. Even in such circumstances the prosecution or the police ought to check and test the *alibi* wherever possible…To weigh one set of evidence with another set of evidence is not to remove the burden of proving that which has to be proved from the party charged with the proof of it…”**

[35] No efforts were expended in that direction by the investigating officer. Thus, the accused’s *alibi* having not been disproved, has the effect of weakening, and rendering doubtful, the Prosecution’s postulation that the attempted abortion could only have been procured by the accused. That being the case, the question of malice aforethought, an essential ingredient of the offence of murder, would not arise. In **Nzuki vs. Republic [1993] KLR 171** the Court of Appeal held that:

> **"...murder is the unlawful killing of a human being with malice aforethought. 'malice aforethought' is a term of art and is either an express intention to kill, as could be inferred when a person threatens another and proceeds to produce a lethal weapon and uses it on his victim; or implied, where, by a voluntary act, a person intended to cause grievous bodily harm to his victim and the victim died as the result...Before an act can be murder, it must be aimed at someone and in addition it must be an act committed with the following intentions, the test of which is always subjective to the actual accused:**
>
> **(i) The intention to cause death;**
>
> **(ii) The intention to cause grievous bodily harm;**
>
> **(iii)Where accused knows that there is a serious risk that death or grievous bodily harm will ensue from these acts, and commits those acts deliberately and without lawful excuse the intention to expose a potential victim to that risk as the result of those acts.**

[36] Hence, having failed to prove that the accused person caused the death of the deceased by an unlawful act, it would be superfluous to engage in a discussion whether she had the intention to cause death or grievous harm. In the result, it is my finding that the Prosecution has failed to discharge the burden of proving beyond reasonable doubt that the death of the deceased, **BC**, was caused by the accused person. She is accordingly hereby acquitted of the charge of murder. She must therefore be set at liberty forthwith unless otherwise lawfully held.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 21ST DAY OF APRIL 2021

OLGA SEWE

JUDGE