



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL CASE NO. 4 OF 2014

REPUBLIC.....STATE

VERSUS

LABAN KIPTARBEI MISOI.....ACCUSED

JUDGMENT

LABAN KIPTARBEI MISOI is charged with the offence of Murder, contrary to *Section 203* as read with *Section 204* of the *Penal Code*.

The particulars of this offence are that on the 1st day of January 2014 at Kimogoch village, Barsendu sub location, Chepsir Location within Nandi County, the accused murdered Christine Jebet.

The prosecution case is that the accused and the deceased herein, were living together as a husband and wife at Barsendu. Prior to the deceased meeting her death, the two had lived together for 3 to 4 years. According to PW-1 and PW-2, the relationship was blissful, but PW-3 who is the father to the deceased indicated at times the two used to quarrel.

On 2/1/2014 at about 7.00 a.m, PW-1 in this case who used to be an assistant chief at Barsendu, was in his house at Buswet. A person called Simon Kirwa Kotut went to him and reported that Laban Kiptarbei Misoi had killed his wife. PW-1 called and reported to an officer called Nchogu at Savani police post. The said officer told him to report at the police station. PW-1 decided to confirm the report before going to report about it. PW-1 who knew the accused person and his wife very well, went to their house. He found a boy by the name of Kiptoo, who told him how the accused had beaten the deceased. PW-1 witnessed the deceased's body on the floor. He went with the boy to report at Savani police post. On that very same morning, at about 8.00 a.m, PW-5 was at Savani police post. The accused rushed there breathing heavily. PW-5 asked him why he had just gotten inside without seeking for permission, but advised him to rest first. There were villagers who were pursuing the accused. The accused then stated that in the morning of 2/1/2014 he was drinking beer in the company of the deceased in a neighbouring house. When they got home they quarreled as the accused suspected the deceased had an illicit affair with a neighbour. He took a club and attacked the deceased with it. He then left her at the sitting room as he went to sleep. When he rose on 2/1/2014 at 6.00 a.m he found the deceased lying on the floor at the sitting room. He tried to wake her up and noted that she was dead. PW-5 arrested him. PW-1 and the boy had also arrived at the police post. They returned to the scene with police officers. They found the body of which one leg was broken. The neck had twisted and had marks like something had been tied on it. It was bruised. There was a broken club (walking stick) nearby. There was also a chain with a wire tied on its one end. The boy said the chain was used to strangle her. The police collected the said chain, broken club and the body.

The body was taken to Nandi Hills Hospital Mortuary. The rest of the items were kept as exhibits.

On 3/1/2014, PW-2 who is the sister to the deceased and PW-3 who is their father, went to Nandi Hills hospital mortuary where they identified the body for post mortem. Dr. Omoke carried out the postmortem. The doctor noted that the body had central and peripheral cyanosis. There were deep burns on the right femoral area. A piece of wood was penetrating anal orifice. There was a slight cut of anus and laceration. There were bruises on the right knee and puncture wound on the right leg, of which was slightly bleeding. There were also superficial burns on the left leg.

Internal appearances noted are that respiratory system had darkened lungs which results from chronic inhalation of smoke. There was blood in the pericardial space due to blunt trauma. Spinal column had marks on the right side of the neck. There was dislocation of C1-C2 of the spine. The doctor opined that the cause of death was due to C1-C2 dislocation of the spine and blunt trauma to the region around the heart.

The filled postmortem form, broken walking stick and the chain were produced in court as exhibits.

At the close of the prosecution case this court found that the accused had a case to answer and accordingly placed him on his defence.

The accused gave sworn testimony and called one witness. His defence is that he was working at Barsendu, Nandi Hills at a Tea factory. From 24/12/2013 he was not at Barsendu but at Kosirai his home, of which is about 30 kilometres from Barsendu. The deceased was his

lover and was at Barsendu. He went back to Barsendu on 2/1/2014. At about 9.00 a.m police called him at Savani. He went at 11.00 a.m. He found officers who alleged that he had killed his lover, the deceased in this case. He was locked in cells. They said they'll investigate the case. Eventually he was charged. He denied the charge. He had last seen the deceased in the morning of 24/12/2013.

His witness, the DW-2 in this case stated that the accused is his cousin and a neighbour at Kosirai. On 24/12/2013 the accused travelled home from Nandi Hills. He arrived at around 4 to 5 p.m. They were mostly together since then upto 1/1/2014. On 2/1/2014 he was called at Sevani police station. Later they heard he was locked in. They went there and were told that he had killed.

At this juncture, the court should determine as to whether the offence against the accused is proved by the prosecution beyond reasonable doubt.

After weighing the evidence adduced by both sides and the submissions by the defence, I find the only issue for determination is whether it is the accused herein who murdered his wife, one Christine Jebet.

The prosecution case lacks the evidence of even a single eye witness as to the occurrence of the incident that led to the death of the deceased. There are two revealed crucial witnesses whom the prosecution failed to call, of which gave rise to the gaping lacuna in their case.

PW-1 stated he got the initial report about the incident from one Simon Kirwa Kotut. We don't know how the said Simon Kirwa Kotut learnt about the incident. Probably he was a crucial eye witness to it, but the police did not consider that. The other is the boy called Ezekiel Kiptoo, the son of PW-2. He was at the scene and is the one who told PW-1 that the accused was beating his wife. PW-2 also saw the said witness with police when she got to the scene. PW-5 the investigating officer said a child told them that the accused used the chain to strangle the deceased. The question is why this boy who had such weighty evidence against the accused was not called as a witness. No explanation was given for failure to call him. In *Bukenya and others –vs- Uganda [1972] EA 549*, the court 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.”

In this case, the said inference is deserved in relation to Ezekiel Kiptoo.

In absence of an eye witness the prosecution case is founded on a single pillar of an alleged admission by the accused person to PW-5. He allegedly stated on the material night he was taking beer with his wife and when they went home they quarreled as he suspected she had an illicit love affair with a neighbour. He attacked her with a club. If I hold that the accused herein told PW-5 what he is alleged to have said, such amounts to an admission and not a confession. The Court of Appeal in *Ben Njioka Kasoa –vs- Republic (Supra)* citing with approval the decision of Supreme Court in *R -vs- Ahmad Abolfadhi Mohamed*, noted:-

“We think we need not say more as the Supreme Court's decision is clear that an admission by an accused person to a police officer investigator cannot be a basis for a conviction without other evidence. It is obvious that the learned judge erred by basing the conviction of the appellant on the sole evidence that he admitted or led the police to where the murder weapons were recovered without any other evidence. This is evidence that only creates suspicion against the appellant but as has been infinitely held by this court, suspicion however strong cannot on its own form the basis for conviction. The suspicion against the appellant required to be corroborated.”

The accused herein repudiated the claim by PW-5 that he admitted having beaten the deceased to death. He denied the charge at plea stage and on his defence. What he allegedly said is not corroborated by any other evidence. It is unsafe to rely on it alone to arrive at a conviction. As such I do find that the prosecution have failed to establish the offence of murder against the accused beyond reasonable doubt. He is accordingly acquitted of the said offence. He is set free unless otherwise lawfully held.

S. M GITHINJI

JUDGE

DATED, SIGNED AND DELIVERED AT ELDORET THIS 30TH DAY OF JUNE, 2021.

In the presence of:-

Mr. Kenei for the accused person

Ms Limo for state

Ms Gladys - Court assistant