



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL CASE NO. 8 OF 2016

REPUBLIC.....PROSECUTOR

VERSUS

DANIEL CHEPKWONY.....ACCUSED

JUDGMENT

1. The Accused Person, Daniel Chepkwony (“Accused Person”) is charged with murder contrary to section 203 of the Penal Code as read together with section 204 of the Penal Code. He is accused of murdering Esther Jemuge Chepkwony (“Deceased”) on 14/02/2016 at Banita Centre, Solai in Rongai within Nakuru County.

2. The Prosecution called four witnesses to prove its case. Kelvin Kiprotich testified as PW1. He is a son to both the Accused Person and the Deceased. He testified that on the night of 14/02/2016, he was with both his parents at their house then he left them and went to his grandmother’s house. At around 9:00pm, Kelvin heard noises coming from his parents’ homestead. When he went there, he said he found them “fighting.” Upon cross-examination, he clarified that: “I found my parents fighting. My father had a cane. He was beating the Deceased. I saw the Accused holding the cane.”

3. Kelvin testified that he left scene and returned the following morning. He did not see the Deceased in the morning but the Accused Person reportedly told him that she was fine. Then, at 4:00pm that day, he went to the home again. Upon knocking on the door, his mother – the Deceased – answered in a weak voice which alarmed Kelvin. He decided to go call a neighbour. Upon returning with the neighbour, however, they found that the Deceased had died.

4. Thomas Katalony testified as PW4. He lived in the same homestead as the Accused Person and the Deceased. Their houses were adjacent to each other. He testified that on the night in question, the Accused Person and the Deceased came home at around 2:00pm. He said he heard the door being opened and the Deceased asking if he (Thomas) was in his house. Thomas, then, heard the Deceased vomiting. He then heard sounds of blows. He said he heard the Deceased say: “Daniel unania kila siku!” upon which the Accused Person responded “nitakumaliza!”.

5. Thomas testified that it was common for the two to fight but on that day he asked the Accused Person what was wrong. He did not receive any answer. Early in the morning the following day, Thomas heard the Deceased calling out the Accused Person’s name severally. When the Accused Person did not answer, Thomas did. The Deceased wanted some water. He (Thomas) took the water to her. It was at 5:00am in the morning and it was still dark. He shone his torch on her and he noticed that she was lying in a pool of blood outside her house. He declined to carry her into the house and instead called the Accused Person who “pulled” her into the house. Thomas then went on with his day and learnt that the Deceased had died that evening.

6. That same evening, the Accused Person went to report the incident at the Banita Police Patrol Base. Corporal Bernard Kipkoech was detailed by the OCS to investigate the case. He went to the scene with the Accused Person. He found the body of the Deceased lying in bed in the house. Testifying as PW3, Cpl Kipkoech remembered seeing a deep cut on the forehead. He disbelieved the Accused Person’s story that he had only hit her with Akala shoes after they quarreled while returning home from drinking. The Officer carried several blood stained clothes from the scene which he produced as evidence. He also produced a blood stained iron bar which he found in the grandmother’s house which he suspected was the murder weapon. However, none of the items were scientifically tested to establish if the stains were of blood of human origin and belonging to the Deceased. They were, therefore, of low probative value.

7. Dr. Ngulungu performed autopsy on the Deceased. He found that the body had swollen head with features of cynosis; multiple lacerations on the head, face; cheeks and back of the head. The body also had bruises over the head and upper trunks. Upon internal examination, the doctor noted extensive clots between the skin of the head and the scalp. He also saw global subdural haematoma. He concluded that the cause of death was severe head injury attended by raised intra-cranial pressure and subdural haematoma due to blunt force trauma to the head. Dr. Ngulungu testified as PW2 and produced the Post-mortem form.

8. Put to his defence, the Accused Person gave a sworn statement. He testified that on the material day (14/02/2016), the Deceased, who was his wife, asked him to go with her to the grandmother's house. While there, they drank 5 litres of busaa together. He testified that at around 3:00pm he told his wife that they should go home. They did. He said that he fell asleep but that when he woke up at around 8:00pm, the Deceased had left the homestead. He went looking for her. He found her at a boma near the grandmother's where, Accused Person said, she was still drinking. He told her to go home with him but she resisted. A brief verbal confrontation followed by the Accused Person insists that it did not turn physical; that he eventually persuaded the Deceased to go home with him.

9. The Accused Person concedes that on the way home they met Kelvin (PW1) but denies assaulting the Deceased. He also denies that Thomas heard him beating his wife. He said that the Deceased woke up the following day and went to milk the cows; and that while milking she fell and hit her head on a stool. The Accused Person testified that he asked the Deceased if it was hurting too much and she responded in the negative so he went and got her some pain killers. He told the Court that the Deceased must have died from the injuries she got from the fall.

10. The offence of murder is defined by section 203 of the Penal Code, Cap 63, Laws of Kenya as follows:

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

11. To successfully obtain a guilty verdict in a murder charge, the Prosecution, therefore, is required to tender sufficient proof of the following three crucial ingredients:

- a. That death of the victim occurred (*actus reus*);
- b. That the death was caused by an unlawful act or omission by the Accused Person; and
- c. The unlawful act or omission was actuated by *malice aforethought*.

12. On the other hand, under section 206 of the Penal Code, *malice aforethought* is established, when there is evidence of:

- i. *Intention to cause death of or grievous harm to any person whether that person is the one who actually died or not;*
- ii. *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;*
- iii. *Intent to commit a felony; or*
- iv. *Intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.*

13. The task of the Court here is to determine if on the evidence adduced, the Prosecution has established the three elements of the offence of murder. Each element must be proved beyond reasonable doubt.

14. There is no question that the Deceased died. Her body was found lying in her bed at home. Dr. Ngulungu confirmed that the cause of death was severe trauma to the head. PW1 identified the body and the Accused Person conceded that the Deceased died. He only questioned the cause of death.

15. PW1 (Kelvin) testified that he saw the Accused Person hitting the Deceased on the night of 14/02/2016. PW4 (Thomas) testified that he heard sounds of blows landing on the Deceased the same night. Both Kelvin and Thomas, then, saw the Deceased in bad condition the following day – suffering from effects of the trauma. Thomas saw the Deceased lying in a pool of blood outside her house. That same evening, Kelvin found her weak at home and decided to go call for help. The Investigating Officer found the Deceased already dead but found several items – including the bed sheets where she lay -- in the house blood stained.

16. Both Kelvin and Thomas gave straightforward testimony. They were credible witnesses and I find them so. They had no motive at all to lie about what they saw or heard. Additionally, what they saw on that day is in keeping with the keeping the habits of the Accused Person and the Deceased: that they used to fight when drunk.

17. While no one saw the Accused Person delivering the fatal blow that killed the Deceased, at least one person saw the Accused Person hitting the Deceased; and at least one other one heard what sounded like blows being landed by the Accused Person on the Deceased. The following day, the Deceased died of blunt force trauma to her head.

18. The Accused Person says that the blunt force trauma was caused by a fall. Dr. Ngulungu explicitly ruled out a fall as the cause of death. In the circumstances of the case, Dr. Ngulungu's theory is supported by surrounding evidence especially the evidence of Kelvin and Thomas. The nature of the injuries were inconsistent with a fall. I therefore the Defence narrative so implausible that there is no inherent possibility that it could be true. While the Defence is not required to demonstrate that its defence theory or narrative is reasonably plausible or probable but it is only required to demonstrate that its version of events or its theory of the case is reasonably possibly true in substance, in this case, the Defence narrative does not meet even this low threshold in order to raise reasonable doubt. The correct test is whether it can be said that the Defence narrative is so improbable that it cannot reasonably possibly be true. (See *S v Shackell (4) SA 1 (SCA)*). In my view, it is not possible to say that the Accused's Person's version of events has any reasonable inherent probability that it is true.

19. On the basis of the existing record, there is little doubt that all the elements of murder have been established against the Accused Person. Consequently, I find and hold that the Accused Person, Daniel Chepkwony, is guilty of the murder of Esther Jemuge Chepkwony contrary to section 203 as read together with section 204 of the Penal Code and I hereby convict him accordingly.

20. Orders accordingly.

Dated and Delivered at Nakuru this 27th day of February, 2020.

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JOEL NGUGI

JUDGE