



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KITALE**

**CRIMINAL CASE NO. 25 OF 2017**

**REPUBLIC.....PROSECUTOR**

**VERSES**

**BELIUM JUMA OSUNDWA.....ACCUSED**

**JUDGEMENT**

1. The accused was charged with the offence of **Murder contrary to Section 203 as read with Section 204 of the Penal Code.**

**The particulars of the offence were that on the 3<sup>rd</sup> day of December 2017 at Mbioni village within Trans Nzoia County murdered LYDIA CHEMELI KEMBOI.**

2. The accused denied the offence and the prosecution called several witnesses to establish its case. It shall therefore be necessary to summarise the same before analysing whether the accused is guilty of the offence or not.

3. **PW1 JANE NEKESA** testified that the deceased and the accused were her neighbours and lived as husband and wife. She said that on the material day she decided to go to the kiosk to buy some cooking fat when she met the accused washing clothes. She asked him why she was doing so when it was the responsibility of his wife. She called her but she was not responding and the accused told her that she was drunk and sleeping.

4. When she came back from the kiosk she decided to see her and she found her lying down and was not breathing. She told the accused to touch her also. She then screamed and many people came and arrested the accused and was taken to the police station.

5. When the police came she saw the deceased body had injuries on the face. The accused said that he had given her porridge. She however did not witness whoever had killed her.

6. When cross-examined she said that she did not know whether the deceased was suffering from epilepsy. She maintained that she had injuries on the side of her head.

7. **PW2 EMILY NABALAYO** testified that she was also a neighbour to the deceased. She said that on the material day she went to church and came back home when she heard pw1 screaming. She went to the scene and found the deceased lying down and had injuries on the face and blood on the floor. She said that the deceased and the accused lived well as husband and wife and that she did not see who killed the deceased.

8. On cross examination she said that she did not know whether she was drunk or not although she had heard people saying that she was epileptic.

9. **PW3 DR OKUMU MOSES** from Kitale County Referral hospital did post-mortem on the deceased body and found that she had injuries on the face and blood on chest cavities and there was fracture on the left side of her head. He concluded that the cause of death was massive haemorrhage due to splint rapture and head injures secondary to assault.

10. On cross-examination he said that he was told that she had been assaulted but there was no mention of her being epileptic.

11. **PW 4 P.C RICHARD RUTO** was the investigating officer. He said that he went to the scene with one Inspector Munene the DCIO and other officers as well. They found several people gathered at the home of the accused and the deceased body was lying in the sitting room. On checking the same they saw bruises on the face, stomach deep cut on the left side of the head and blood was everywhere in the sitting room.

12. The scenes of crime officers took the photographs and the body was taken to the mortuary. The accused had already been arrested by the members of the public and taken to Kapsara Police Patrol Base. According to his investigations there was a fight that night and that is how she sustained the injuries. There was no evidence that the deceased had any underlying medical condition.

13. When cross examined he said that there was no eye witness to the incident and that the accused had washed some clothes that morning. He did not get to know whether the deceased arrived home drunk that night.

14. When placed on his defence the accused gave unsworn evidence denying the charge. He said that on the 2<sup>nd</sup> December 2017 he left home for his casual work and came back at around 6.40 pm and found his wife drunk and she suffered from epilepsy. She was asleep and she had fallen on the table and injured herself. She told him that she had injured her ribs and she had injuries on the face as well.

15. He then went to his neighbour to borrow money to take her to the hospital but he was told to wait till the following day. He prepared dinner and slept. The following morning, he prepared breakfast which the deceased took and he also did some chores before leaving to look for money to take her to the hospital.

16. He went to his boss who had by then left for church and he waited for him till 11am when he came and gave him the money. He came back and before he reached his home he saw many people and upon inquiry he was told that the deceased had died. He went to the house and found that she had actually died.

17. He said that they had lived peacefully for 12 years and had 3 children. He went to report at Cherangany police station where he was arrested and later charged with the offence which he continued to deny.

### ANALYSIS AND DETERMINATION

18. Parties herein were then ordered to file written submissions which they did and the court has perused the same and save that they each pull towards their respective poles the court does not intend to reproduce the same here. The issue however is whether in light of the evidence adduced the prosecution established its case against the accused beyond the shadow of doubt.

19. It is clear that there was no eye witness to the incident. PW1 and PW2 arrived at the scene separately but found the deceased already dead. Although the accused said that he had gone to look for money from his boss so as to take the deceased to the hospital and when he arrived home he found many people gathered and was told that she had died, that evidence was not subjected to cross examination. The same in my view was unbelievable given that pw1 and 2 were his neighbours and found him at the scene.

20. As a matter of fact, pw1 found him washing clothes and the child was crying as she went to the kiosk to buy some cooking fat. This line of evidence was not challenged during cross examination by the defence counsel. In fact, it was pw1 who decided to check on her when the accused told her that she was unwell and was sleeping in the house. She said that she found her already dead and she asked the accused to touch her. The deceased had injuries already which were visible on her body and blood was on the floor as found by PW2 and the investigating officer.

21. It is therefore clear that the deceased must have met her death inside her house as evidenced by the blood on the floor inside the sitting room. Further the pathologist concluded the cause of death to be as a result of the injuries she sustained which included a deep cut on the head and massive bleeding.

22. Can one therefore agree that the deceased died as a result of hurting herself on the table as explained by the accused? Was there evidence that she suffered from epilepsy as the defence tried to push? Suddenly not. If there was such evidence, then nothing would have been difficult than to adduce the same especially by the accused who claimed that they had stayed with her for 12 years as husband and wife.

23. The pathological conclusion showed the injuries to have been very severe which cannot be through a fall. The massive deep cut on the head was not caused by such a fall but by a deliberate assault by someone. There was no evidence even from the accused that she sustained the injuries elsewhere whether in the drinking spree which he wants the court to believe.

24. The upshot of this is that the evidence by the accused was of no probative value for the reason that it was not subjected to cross examination as it was unsworn and at the same time did not oust that by the prosecution. As stated above there was no eye witness to the murder and thus the only suspect is the accused. This court must therefore as correctly have captured by the prosecutor in his evidence rely on circumstantial evidence.

25. The case of **R VS KIPKERING ARAP KOSKE & ANOTHER 16 EACA 135** clearly captured the factors to be considered when the court considers this element of circumstantial evidence. The court went on to state that;

***“In order to justify the inference of guilt, the inculpatory fact must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt”.***

26. Considering the above authority and the evidence at hand the inculpatory facts are incompatible with the innocence of the accused herein. The deceased was his wife and did spend the night together. He clearly admitted that when he arrived on the evening of 2<sup>nd</sup> December 2017 the deceased was drunk and already injured. The deceased in the circumstances and in the accused's own admission sustained the injuries in their home and nowhere else.

27. Secondly as he washed the clothes outside he already knew that she had sustained the injuries and was already dead. The injuries as

found by the doctor were serious and could not have been inflicted by mere fall on the table. He must have known how she sustained the same.

28. In any event there was nothing difficult in explaining to PW1 what had transpired. The pool of blood found in the sitting room where the body was not as a result of a fall. The accused did not bother to call his boss whom he alleged to have gone to seek some money so as to take his wife to the hospital.

29. In the premises, this court finds that the accused for whatever reasons must have injured the deceased that fateful night and perhaps to conceal what had happened washed the clothes which pw1 found it strange considering that that was the responsibility in the ordinary cause of events to do.

30. The accused is hereby found guilty of murdering the deceased as provided under the provision of Section 203 of the Penal code.

**Dated, signed and delivered at Kitale in open court this 30<sup>th</sup> day of July 2020.**

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**H. K. CHEMITEI**

**JUDGE**

**30/7/2020**

**In the presence of:-**

**Mr Bororio for the Accused person**

**No Appearance for the State**

**Accused – present**

**Court Assistant – Kirong**

**Judgement read in chambers.**