



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUNGOMA

CRIMINAL CASE NO. 34 OF 2017

REPUBLIC.....PROSECUTOR

VERSUS

JACKLYNE CHEPKWEMOI BELIO....ACCUSED

JUDGMENT

The Accused **JACKLYNE CHEPKWEMOI BELIO** was charged with the offence of Murder contrary to Section 203 as read with Section 204 of the Penal code. Particulars of the offence being that; On the 1st day of December, 2017 at Chemweisus village, Chemweisus Sub-Location in Mt. Elgon Sub-County within Bungoma County with others not before court murdered **RICHARD CHEROBEN PSENJEN**.

Pw4 Benson Naibei Ndiema, was the brother of the deceased Richard Cheroben Psenjen In 2017 the deceased asked him if the deceased would stay at his house and farm and pay him monthly fee of Kshs.300/=. He allowed him. The deceased moved into the homestead with the accused as his wife. Later, he received information that accused was brewing changaa in his house. He went there in November, 2017 and gave deceased notice to vacate the premises. After 3 days from the date of notice he received information from his livestock caretaker that he had seen a dog eating a piece of human arm. He went there and found many people. They saw freshly dug soil covered with shrubs. Police were informed and came. They directed the soil to be removed. They found a long trouser, belt and note book. They also recovered a human skull and other human body parts.

Pw2 Wycliff Chemai Psenjen the other brother of deceased received information on 13.1.2017 that the deceased body had been found at the home where he was staying with his younger wife the accused. He went there and confirmed that the body was found outside the house in a bush. As the body was badly decomposed he volunteered his hair to be taken for DNA matching with the body parts of the deceased, for identification.

Pw11 No.87087 P.C. Kenndy Kipsoi attached to Kapsokwony Police Station testified that on 13.12.2017 at 9.30a.m. he together with other police officers visited the scene of murder. At the scene they found many people present. They observed what appeared to be a shallow grave covered by branches. Next to it was a bone and trouser, inner wear and handkerchief. The family members identified the clothes as that of the deceased. They removed the bones and skull, recovered elsewhere and took it to Webuye Mortuary. A Post - Mortem was done. Samples of body parts were taken to Government analyst for DNA analysis and comparison with deceased's brother's hair and blood specimen of the mother of the deceased.

Pw7 Polycap Lutta Kweyu the Governor analyst received the sample of a small piece of a small piece of bone suspected to be that of the deceased nails from his brother and blood sample from his mother Anna. Upon analyzing the samples for DNA profiles, he confirmed that Anna is the biological mother of the deceased and Wycliff is the biological brother. Pw8 Dr. Edward Bilembwa who examined the skull and disengaged bone of arm, disengaged spine and hands with no fingers. He only observed a sharp injury on the skull.

Pw5 Chief Inspector Danson Nyamoi attached to DCIO Elgon received the accused who had surrendered himself to the police station and wanted to make a confession. He administered the normal caution and she wished her sister Mercela Chebet Chemwyo to be present. She then voluntarily made the confession which he recorded which she signed and he counter signed. Pw6 Mercela Chebet gave evidence and confirmed that she was present when the accused was recording the confession with Pw5.

Upon being placed on her defence, the accused gave sworn evidence. She testified that the deceased was her husband with whom she was staying. He also had another wife. The deceased was a livestock trader. On 8.12.2017 the landlord of the premises there they were staying in gave her notice to vacate. She moved to the home of her sister Teresa. She was later called by a friend of the deceased who asked her where the deceased was, she told him she did not know. On 15.12.2017 the clan elder called her and informed her that the body of deceased had been found and people were alleging that she was the suspect. He advised her to go to the police station which she did. At the Police station she was threatened that she will be released to the mob and she decided to record a confession in the presence of her sister Mercela. She testified that she last saw deceased on 15.11.2017 when he had been stabbed by Alice the co-wife. She testified that she did not know who killed the deceased and that while admitting she made the confession, she contends that it was under duress for fear of being handed

over to a mob.

M/s Wakoli Counsel for the accused filed written submission. Counsel submitted that the prosecution is under a legal duty to establish beyond reasonable doubt that it is indeed the accused person who inflicted the injury to the deceased, the deceased died from the said injuries and that the accused had the necessary intention of causing death or grievous harm. Counsel submitted that the prosecution heavily relied on the confession made by the accused but which I was retracted in court. She submitted that the said confession was not voluntarily given, same was recorded in presence of a co-investigator in a language the accused and her witness did not understand. Further since the contents of the statement were never read back to the accused, it would not be safe for the court to rely on it.

Counsel submitted that if the court finds the confession admissible and accepts the accuseds version of events, then the defence of provocation and self - defence now apply. Counsel submits that from the contents of the confession it is clear that the accused was faced with serious attack and was in immediate danger which necessitated her to act in self defence. Counsel submitted that self defence is an absolute defence and the accused has laid facts to prove the same and accused should be acquitted.

In a charge of Murder the prosecution must through evidence establish all the ingredients of the offence. These ingredients are;

a. The fact and cause of death

b. The unlawful act or omission causing death

c. Presence of malice aforethought

d. Positive identification that accused committed the unlawful act or omission or inflicted the injuries on deceased from which he died.

The first issue the prosecution must establish is that the deceased died. It must be shown that the person named in the charge sheet as the one killed by the accused did actually die. The identity of the deceased can be proved by evidence of the relatives or witnesses who confirm that they saw him having died and identified him to be the doctor who would confirm the fact and cause of death. The identity of the deceased can also in extreme cases be presumed from the circumstances as where an accused kills a person and throws the body in a river and body is not recovered. In other cases, as in this one, where the body has decomposed beyond recognition scientific evidence can be adduced to identify the deceased as the person who died. This can be done by use of forensic evidence which includes DNA profiling of such parts as blood, hair, bones or are other technological evidence. Technological advances including DNA evidence has become a more reliable tool to prove identity of the deceased from body parts. DNA testing has also become the most reliable and conclusive way of confirming the biological relationship between two individuals. The tests can be used to pursue paternity but can also be used to prove relations. This can be done through DNA relationship testing which involves testing close members of the family to confirm various types of relationships. The tests can be performed between siblings, parents, uncle/aunt and niece/nephew and parents and grandparents. The samples of the deceased which is to be subject of the DNA analysis can be obtained from items which are likely to contain DNA material such as toothbrush, tissue, cigarettes butt used recently by the deceased. Where the body has been buried and decomposed, bone fragments can be used for DNA analysis. In this case there is evidence that deceased body had decomposed and other parts eaten by dogs. Indeed it is a dog which was feeding on the deceased's leg that drew attention to the relatives of the deceased who searched and found a shallow grave from which more body parts were removed.

Pw7 Polycarp Lutta Kweyu received a small piece of bone suspected to be that of the deceased Richard Cheroben, piece of finger nails of Wycliffe Chemai, the brother of the deceased and blood sample from Anna Shiga the mother of the deceased. He generated DNA Profiles which confirmed that Anna is the biological mother of the deceased and Wycliff Chemai is the biological brother of the deceased. The evidence of the prosecution witnesses is that the deceased was son of Anne Shiga Psenjen and brother of Wycliff Chemai Psejen. The DNA Profiles confirmed this and this court therefore finds that the body parts recovered from the shallow grave were those of the deceased. This confirms that Richard Cheroben Psenjen is dead.

On 23.5.2019, Pw5 Chief Inspector Danson Nyamoi who recorded a confession statement testified that 19.1.2017 the accused was brought to him for the purpose of recording a confession. He asked her which language she wanted to use and she elected to use Kiswahili. He noticed that she was accompanied by Mercela Chebet her sister. After administering the caution, she elected to give the confession in Kiswahili while he recorded in English. After the confession she signed, her witness signed and the witness counter-signed and prepared the certificate.

M/s Wakoli objected to the production on the basis that the accused was threatened. The court allowed production of the confession and promised to give reasons, in this Judgment

Section 25 of the Evidence Act defines confession as words or conduct or combination of words and conduct from which whether taken alone or in conjunction with other facts proved an inference may reasonably be drawn that the person making it has committed an offence.

A confession is an admission of fact made by an accused person. This is admissible in evidence. Section 25A Evidence Act provides;

Confessions generally inadmissible

25A (1) A confession or any admission of a fact tending to the proof of guilt made by an accused person is not admissible and shall not be proved as against such person unless it is made in court before a judge, a magistrate or before a police officer (other than the investigating officer), being an officer not below the rank of Inspector of Police, and a third party of the person's choice.

(2) The Attorney-General shall in consultation with the Law Society of Kenya, Kenya National Commission on Human Rights and

other suitable bodies make rules governing the making of a confession in all instances where the confession is not made in court.

The AG pursuant to this provision made rules in Legal Notice No. 4/2009 known as Evidence (out of Court confession) Rules Section 4 of the rules sets out the rights of the accused where it provides;

4. Rights of accused person.

(1) Where an accused person intimates to the police that he wishes to make a confession, the recording officer shall take charge of the accused person and shall ensure that the accused person –

(a) has stated his preferred language of communication;

(b) is provided with an interpreter free of charge where he does not speak either Kiswahili or English;

(c) is not subjected to any form of coercion, duress, threat, torture or any other form of cruel, inhuman or degrading treatment or punishment;

(d) is informed of his right to have legal representation of his own choice;

(e) is not deprived of food, water or sleep;

(f) has his duration, including date and time of arrest and detention in police custody, established and recorded;

(g) has his medical complaint, if any, adequately addressed;

(h) is availed appropriate communication facilities; and

(i) communicates with the third party nominated by him under paragraph (3) prior to the caution to be recorded under rule 5.

(2) The recording officer shall not record a confession from any accused person who complains to him of being a victim of torture or whose physical appearance shows signs of physical injuries including open wounds, body swelling, or shows extraordinary fatigue or any other indicators that would suggest that the accused person has been tortured.

(3) The recording officer shall ask the accused person to nominate a third party who shall be present during the duration of the confession session, and upon the appearance of the third party, the recording officer shall record the third party's particulars and relationship to the accused person.

5. Caution to the accused person.

(1) The recording officer shall caution the accused person in the following terms and shall record his response:

“Do you wish to say anything? You are not obliged to say anything unless you wish to do so but whatever you say will be taken down in writing and may be given in evidence.”

(2) While recording the confession, the recording officer shall ensure, and record compliance, that where the confession session is prolonged, the session included rest and relaxation periods.

(3) The recording officer shall ensure that the confession is recorded at the same time it is made and shall record the date and time of commencement of the confession session and the place where the confession is recorded.

Section 26 provides circumstances where confession recorded will be admissible. It provides;

26. A confession or any admission of a fact tending to the proof of guilt made by an accused person is not admissible in a criminal proceeding if the making of the confession or admission appears to the court to have been caused by any inducement, threat or promise having reference to the charge against the accused person, proceeding from a person in authority and sufficient, in the opinion of the court, to give the accused person grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him.

M/s Wakoli Submitted that the confession should not be admitted because there was threat that police would release her to the mob and that she only agreed to the confession after thinking of how her children would survive if she was killed by the mob.

The Evidence of the accused is that she received information that body of the deceased had been found. She went to the police station where she was arrested. Pw11 Kennedy Kipsoi attached to Kapsokwony police station testified that when the accused surrendered to the police, in respect of the murder, he took her to the Deputy DCIO who recorded her confession. He denied being present when she was recording the statement or threatening her with possibility of releasing her to the mob.

Pw6 Mercela Chebet the sister of the accused was present when accused recorded the statement. She testified that the accused was speaking in Kiswahili and the police officer recorded in English. She stated that the accused was talking and the officer recording. She confirmed that the accused signed and this witness also counter-signed the statement.

Neither the accused nor Mercela her sister testified that the recording officer C.I. Danson Nyamoi issued any threats before recording the statement. Indeed they only mentioned P.C. Kennedy Kipsoi but Kennedy denied being in the place where the statement was recorded.

From the evidence on record, Pw5 C.I. Danson Nyamoi established that preferred language of communication with accused to be Kiswahili, which language the accused spoke fluently with Court while giving her defence. He informed her, her right to have a person of her own choice to be present where upon she invited Pw6 Mercela Chebet her sister. The accused did not report any threats or injury or deprivation of food, water or sleep or have any Medical complaint. The accused admits to signing the statement which her sister the 3rd party also signed.

Considering all the steps taken I am satisfied that the accused confession was voluntarily given and therefore admissible in evidence. In the confession by the accused;

“Later at around 4.00p.m. my husband came back while drunk and started quarreling me, that he will leave me in our rented house and I will take upon myself the responsibility of rent fee as well as caring for the children”. I asked him the reason why he thought of doing that but he told me that he had already decided and if I was unable to meet the responsibilities I can as well look for another husband. I then told him that if he has already decided to leave me I can not bring up his child (our last born, 9 months) and therefore he can take child with him.

My husband became angry and he took his walking stick and attempted to hit me. I defended his first attempt using my hands and in the second attempt I managed to grab the stick from him. I aimed to hit him at the right hand but unfortunately he bent forward and the stick landed on his back head, sending him down while blood oozing from the injury. He lay unconscious and could not talk. I was optimistic that he would regain consciousness after a moment, but later I realized that he was dead. Upon realizing that he was dead, I became terrified, confused and I could not know what to do. Later I decided to call my close friend called Isaac Kiplol who was in a nearby home of one, Peter. We went back to the house with him and after seeing the deceased I asked him what I can do and told to let him go and he will come later. So at around 10.00p.m. he came back in company of two others one called Kwemoi but the other one was a stranger to me. They were carrying one Jembe and a Panga.

They told me they were going to dig a grave and come back to pick the body so as to bury it in concealment. They came back after one hour and pick the body and I accompanied them to the grave about 50 metres from the house in thickets where the body was buried and covered with soil. The following day 2nd December 2017 at about 10.00p.m. Isaac went back to the grave and covered the top soil with thorny vegetation. We buried the body with clothes the deceased was wearing on this day.

On the same night after burial I threw the walking stick into the bush but I could not remember exact location because it was dark. I further wish to state that at the time of his death, deceased had in his purse Cash 1,000 and mobile phone make Techno, which I took possession. I wrapped the phone in my nylon paper and hid it in a bush within Kibundo area, but I have already spent the money.”

Upon considering all the evidence, I am satisfied that the prosecution has established that it is accused Jackline Chepkwemboi Belio who murdered her husband the deceased. I therefore find the accused guilty of the charge of Murder contrary Section 203 as read with Section 204 of the Penal Code. I therefore convict her of the charge of Murder under section 215 Criminal Procedure Code.

Dated at Bungoma this 28th day of October, 2020.

S.N. RIECHI

JUDGE