



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KITALE**

**CRIMINAL CASE NO. 48 OF 2014**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**STEPHEN TUWIT KOSTAN.....ACCUSED**

**J U D G M E N T**

1. The accused herein has been charged with the offence of **Murder contrary to Section 203 as read with Section 204 of the Penal Code**. The particulars of the charge were that **on the 6<sup>th</sup> day of October 2014 at Simatwa village in Kapcherop within Elgeyo Marakwet murdered Selly Cherotich**.

2. The accused denied the offence. The prosecution called a total of 4 witnesses whose evidence can be summarised as follows.

**PW1 Christine Yator** testified that both the deceased and the accused were her neighbours. She said that she was in her house which is 20 metres from that of the accused. At around 10.00 pm she heard screams from her children who were coming back from preps. They were shouting that someone was being killed. She rushed to the scene and found the deceased injured and blood oozing from the head and the mouth.

3. She then sent for the deceased brother who came and took her to the hospital. She however did not see the accused assault the deceased save that the children told her that they saw him. She however heard after 2 days that she had passed on.

4. **PW2 Richard Kosgei Komen** the deceased brother testified that neighbours came to his house at around 10.00 pm and informed him of the incident. He went to the deceased house which was about ½ km from his home and he found the deceased bleeding. They sought assistance from the Assistant chief. They hired a vehicle and took the deceased to Kitale District hospital. They searched for the accused that night and found him hiding in an abandoned house together with his 2 young children. He was arrested and taken to the police station.

5. The witness also attended the deceased post mortem exercise. They also recovered a blood stained club which was taken by the police.

6. **PW3 Kiptogon Kipsoo** is the Assistant chief Kapcherop location. He said that both the deceased and his wife were his subjects. He said that he was called by PW2 at around 11.00 pm and told of the incident. He went to the scene and found the deceased wounded and was in a neighbour's house. He was bleeding from the head, nose and mouth. They took her to Kapcherop and later Kitale District hospital. They searched for the accused and found him in an abandoned house with his children. According to him the accused appeared drunk. They arrested and took him to the police station. He said that the two had been quarreling but he had helped them reconcile. Both used to drink.

7. **PW4 Dr. Okumu Moses** produced the post mortem report prepared by Dr. Odhiambo which concluded that the cause of death was severe head injury with external hemorrhage.

8. When placed on his defence the accused gave unsworn evidence denying the charge. He said that on the material day the children from his first wife had come and he went to the market to shop and later went on a drinking spree. He came home in the night and was told on the following day that his wife had been beaten and she died 2 days later.

**Analysis and Determination**

9. Having carefully read the proceedings herein and heard the parties, it is not in doubt that the deceased died as a result of the assault injuries she sustained. Apparently, there was no eye witness to the incident as the school children mentioned by PW1 were not called to testify.

10. This therefore meant that the matter ought to be determined through circumstantial evidence.

11. It was stated in ***Dhalay Vs Republic (1995 – 1998) 1 E.A. 29*** regarding circumstantial evidence that;

***“ In order for circumstantial evidence to justify the inference of guilt two tests had to be satisfied. Firstly, the exculpatory facts had to be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis but that of guilt and secondly, it was necessary that there be no other co-existing circumstances which would weaken or destroy the inference of guilt.”***

12. PW2 and PW3 clearly stated that they found the accused hiding with his 2 young children in an abandoned house that same night. That fact was not controverted by the accused either through cross-examination or at least in his unsworn evidence. The hiding took place within the period his wife had been injured. It is therefore easily and irresistibly too conclude that he was hiding after assaulting his wife and leaving her when the children raised alarm.

13. Secondly, PW3 the area Assistant chief explained that the two had been known to quarrel and fight and had in fact recently reconciled them. Both appeared given in to too much alcohol and would lead to domestic fights. It must be emphasized though that there was no evidence that the deceased was drunk.

14. Consequently, I find that his defence is not incompatible with his innocence. Although the murder weapon was not produced, the 3 witnesses clearly explained the state of the deceased when they found her. No other person was suggested to have been with the deceased.

15. In conclusion therefore I hold that the prosecution had proved beyond doubt that the accused assaulted his wife that fateful night which injuries caused her death 2 days thereafter. The accused is hereby convicted under the provisions of Section 203 of the Penal Code.

**Delivered, signed and dated at Kitale this 30th day of January, 2019.**

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**H.K. CHEMITEI**

**JUDGE**

**30/1/19**

**In the presence of:**

**Mr. kakoi for the State**

**Mr. Abari for Accused**

**Accused – present**

**Court Assistant – Kirong**

**Judgment read in open court.**