



**REPUBLIC OF KENYA**

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

**CRIMINAL CASE NO. 22 OF 2017**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**ISAAC KIRUI.....ACCUSED**

**JUDGEMENT**

**INTRODUCTION**

1. The accused is charged with murder contrary to section 203 as read with section 204 of the Penal Code (Cap 63) Laws of Kenya, in respect of the deceased, Damaris Kerubo.
2. The accused pleaded not guilty.
3. The prosecution called five witnesses in support of the charge.

**The case for the prosecution**

4. The prosecution called Lucy Ntutu (Pw 1), whose evidence was that the accused was the husband of the deceased. The deceased was one of her tenants. Pw 1 testified that the couple lived in a one roomed house. She also testified that she saw the body of the deceased on a bed covered with a blanket.
5. The prosecution then called Dr. Titus Ngulungu (Pw 2). Pw 2 performed the postmortem examination on the body of the deceased, which was identified to him by James Nyairo. The postmortem report was produced as exhibit 1. Upon examination, the external appearance of the body was as follows. Lack of oxygen shown on the body by cyanosis. Pw 2 also found the following upon examination of the internal organs. The stomach contained semi-digested material with tiny white particles. The mucosa in the genito-urinary system appeared hemorrhagic. The scalp part of the head, had a bruise around the occiput. The body was embalmed in ten percent formalin. According to the pathologist the cause of death was due to chemical poisoning and gastritis in the body with a large bruise at the back of the head due to blunt trauma force. The pathologist then took the following tissues for toxicological profiling. The stomach and its contents, the liver, kidney, blood and the system of excretion; which he handed over to the police officer.
6. Furthermore, the pathologist in respect of the toxicological report by the Government analyst showed the following. Organophosphate pesticide was found in the samples sent to the Government analyst, which are used to destroy pests. When it is ingested they block neuron transmission resulting in paralysis to the heart, lungs etc, leading to death. The analyst report was put in evidence as exhibit 2.
7. While under cross examination, the pathologist testified as follows. The poison was orally administered. If ingestion was forced there would be injuries in the mouth and not the throat. Any mouth injuries were obscured by embalming. There was a blunt injury on the back of the head. Usually people who commit suicide do not have other injuries. According to Pw 2 the injuries suggested forced ingestion and that the injury on the body of the deceased was inflicted before death; which was evidenced by the tissue reaction namely haematoma bruise between 50mm x 60mm, which haematoma usually occurs when a person is alive. It was also the testimony of the pathologist that the injury was inflicted from the back as it was on the back of the head, which was caused by a hard object. Finally, the pathologist testified that there was inflammation of the stomach contents.
8. Apart from the foregoing witnesses, the prosecution also called Douglas Angima (Pw 3). Pw 3 was the security assistant to the Talek security group. Pw 3 testified that the deceased told him that she had disagreements with the accused and that she needed their help. Pw 3 decided to await the availability of his chairman in order to address the complaint of the deceased. By the time the chairman returned on 4<sup>th</sup> November 2013, the deceased had died.
9. The prosecution also called APC Thomas Mwinga (Pw 4). Pw 4 testified that he was informed of a fight at 7.00am. He then proceeded to the scene of crime. There he found the deceased dead on a bed. The accused was also there and had a bottle of an insecticide for bed bugs.

The accused told Pw 4 that the deceased had poisoned herself. He then removed the body of the deceased to Sekenani police post. It was Pw 4 and another officer who were the first to arrive at the scene of crime. Pw 4 met the accused in the house with a bottle of diazonol, which is used for bed bugs. The bottle was taken possession of by APC Geoffrey Kipsang. There was a group of people who wanted to beat the accused. As a result, he took the accused to their office. Pw 4 also testified that there was a curtain sheet that divided the one room house into a bed room and a sitting room, which was blood stained. The floor appeared to have been mopped and was not yet dry.

10. Finally, the prosecution called No 62029 Peter Leteipa Rinka (Pw 5), who investigated the case. It was his evidence that he took a private motor vehicle with which he took the body of the deceased to Narok referral hospital mortuary. Upon seeing the body of the deceased, Pw 5 saw the following on that body. It was swollen and was foaming from the mouth and nose, both of which were blood stained. The whole house smelled of diazonol. Ap. police officers gave him a bottle, which contained the said diazonol, which was put in evidence as exhibit 3. He also took the accused to Sekenani police post. He further testified that the scene of crime had been interfered with and that it was not possible to establish as to whether there were any signs of struggle in the house. Pw 5 also testified that he recorded statements from witnesses including that of Angima (Pw 3). Pw 3 told him that the deceased and accused quarreled. He testified that the body of the deceased was covered with sheets and that he found no evidence to link the accused with the death of the deceased. Finally, Pw 5 was also unable to establish whether or not the deceased committed suicide.

### **The case for the defence**

11. After being explained of his rights as to whether the trial was to start de novo or not as required by section 201 (2) of the Criminal Procedure Code (Cap 75) Laws of Kenya; the accused elected to proceed with the trial from where it had reached before Meoli, J. His counsel Mr. Kilele confirmed the position. The accused then decided to give sworn evidence and to call four witnesses. In the end the accused did not call these witnesses.

12. In his sworn evidence, the accused testified that he is a maize and beans farmer. He also testified that he was employed by one Mubarak as a turn boy at Talek in Maasai mara. He further testified that the deceased was his girlfriend. It was his evidence that on 3<sup>rd</sup> November 2013 they went to Transmara west to bring roofing grass. Thereafter they returned and while en- route he got a telephone call from the deceased. she was crying then. He asked her as to what was the problem. She did not reply him. Upon arrival at Talek in his house, she found the deceased who appeared drunk. She used to work at a bar called Equator pub. He then went to sleep. At about 3.00 am the accused woke up. As he was exiting their house, he found the deceased crying saying that:” *my mother I am dying.*” He then asked her as to why she wanted to die. In response she pulled him into the house; as a result of which she fell down. The accused then decided to call a neighbour by the name Emmanuel. It seems Emmanuel and his wife went to the house of the accused. The deceased said “*mimi nimekunywa sumu*”. They tried hard to have her vomit the poison without success. The accused then rang the AP police at Talek and told Cpl Sang that the deceased had taken poison. In the following morning at 7.30 am Cpl Sang arrived, who then collected the bottle from where she had drunk the poison. Cpl Sang rang a doctor who arrived and said that the deceased could not be rescued. The accused was shortly thereafter arrested and taken to Talek AP Camp.

13. Upon being cross examined, the accused testified that he was not in their house when the deceased died. He further testified that he was on the return journey from Transmara where he had gone to work.

14. The defence then closed its case.

15. The defence did not file any written submissions notwithstanding having been given an opportunity to do so.

### **Issues for determination.**

16. I have considered the entire prosecution and defence evidence in the light of the applicable law. As a result, I find the following to be the issues for determination. 1. whether or not the deceased committed suicide. 2. whether or not it is the accused who caused the death of the deceased 3. Whether or not the evidence discloses murder or manslaughter.

#### **ISSUE 1**

17. The issue as to whether the deceased committed suicide turns on the evidence of pathologist, Dr. Titus Ngulungu and the scene of crime. According to the pathologist the poison found in the body of the deceased was administered orally. The deceased had a blunt head injury at the back of her head and other injuries. The pathologist testified that people who commit suicide do not have other injuries; such as the one the deceased had. He also testified that the injuries were inflicted before the deceased died. The presence of those injuries suggested that the ingestion of the poison was forced upon the deceased.

18. Furthermore, the evidence of the scene according to APC Thomas Mwinga is that the curtain sheet that divided the one roomed house into a bed room and a sitting was blood stained and the floor had been mopped, but was not yet dry. In the circumstances of the case, I find that the blood stains must have come from the body of the deceased from the inflicted injuries. I therefore find that the deceased did not commit suicide.

#### **ISSUE 2**

19. The evidence of Lucy Ntutu is that it was the accused and deceased who were living in her one roomed house. Furthermore, the evidence of APC Thomas Mwinga is that he found the accused in their rented house holding a bottle containing a pesticide for killing bed bugs. The accused then told him that the deceased had committed suicide by taking the poison. At that time the deceased was dead and was lying on the bed. There was no third party in that one roomed house as at that time. I also believe the evidence of APC Thomas Mwinga that he found the accused and the deceased in their rented house at the material time. I do not believe the evidence of the accused that he tried to assist the deceased to vomit the poison. Finally, I do not believe his defence of alibi. The circumstantial evidence clearly and irresistibly points to the

accused as the person who caused the death of the deceased.

### **ISSUE 3**

20. According to the report of the postmortem the deceased died due to poisoning and a blunt injury at the back of her head. In the circumstances, I find that the evidence discloses murder and not manslaughter.

### **Conclusion**

21. The upshot of the foregoing is that I find the accused is guilty of murder and therefore convict him of murder contrary to section 203 as read with section 204 of the Penal Code.

**Judgement signed, dated and delivered at Narok this 19<sup>th</sup> day of June, 2019 in the presence of Mr. Omwega for the state and Mr. Kilele for the accused.**

**J. M. BWONWONGA**

**JUDGE**

**19/6/2019**