



**REPUBLIC OF KENYA**

**IN HIGH COURT OF KENYA AT BUNGOMA**

**CRIMINALCASE NO. 17 OF 2017**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**FIDIA CHEBET CHESTIT.....ACCUSED**

**JUDGMENT**

The accused Fidia Chebet Chestit is charged with the offence of Murder Contrary to Section 203 as read with Section 204 of the Penal Code Cap 63 Laws of Kenya. **Particulars of the offence are that;** on the 16<sup>th</sup> day of April, 2017 at Bukonoi Village of Cheptais Sub-County within Bungoma County murdered MILKAH CHEPTEKEI CHESTIT.

The case for the Prosecution is that on 16.4.2017 Pw1 Gladys Chepkemioi Kusan was at the home of Christopher Munya where illicit liquor was being sold. She ordered busaa for Kshs.50/=. She drank the same and she with Rhoda and the deceased decided to go to pick vegetable. While on the way accused came with one Wycliff and she then started attacking the deceased. The accused took a knife and stabbed the deceased on the abdomen and chest. The deceased fell down. They raised an alarm and people came who took her to Cheptais hospital. The accused and deceased were sisters and she did not know the reason for the attack.

Pw2 Jesca Cherotich Mugane was in the house when he heard screams from outside. She went there and found the accused holding the deceased. She then heard screams "please help me" while holding her chest. She then fell down. She saw accused carrying a knife and left the scene. She went closer to where deceased was and saw she had stab wounds on chest and abdomen from where she was bleeding. The deceased was taken to Hospital where she died.

Pw4 Rhoda Chemutai Gideon was on the material day at the home of Christopher Munya with Gladys (the accused) Margaret and the deceased. They then left with accused, and deceased on the way she met one Kara who called her and she waited leaving the accused and deceased going a head of her. After a short time she heard deceased screaming for help. She ran there and found deceased lying down and bleeding from the chest. She raised an alarm and people came and took deceased to Hospital. She ran home to inform her parents as both the deceased and accused are sisters. The accused being the eldest and deceased her follower.

Pw9 Wycliff Kipngeting Chenge was with accused, Hillary, and on the way met Stephen who was a friend of one person called alias Mbuzi who was with Milka the deceased. The accused then got hold of the deceased and they started quarrelling. He then saw accused stab the deceased twice while shouting "umenicheza akili". The deceased fell down and accused ran away. Deceased was taken to Cheptais Hospital where she died.

Pw7 Dr. Harun Ombongi who performed the Post Mortem found deceased had 2 stab wounds on the chest and abdomen. The one on the Chest penetrated to the lung which collapsed. She also had a superficial stab wound on the abdomen. As a result of the examination he formed opinion that cause of death was due to pulmonary arrest secondary penetrating chest injury.

At the conclusion of the prosecution case. The accused was put on her defence. The accused gave sworn statement in her defence. She testified that the deceased was her sister. She stated that she had been married to one Edmund Kimkeni Kimechos with whom they had 4 children. In the year 2000 the deceased was sick and accused took her to her home. While staying with them, the accused found deceased in bed with her husband and they ran away. In 2008 while in prison (for another matter) she was examined and found to be HIV Positive. The deceased was also HIV Positive. On 16.4.2017 while the deceased was in a drinking spree she was stabbed with a knife. Accused went to the scene and found her lying down. She saw blood stains on the deceased's T-shirt. She and her brothers took her to hospital. She was later arrested and charged with the present charge which is a frame up because they were not in good terms.

The accused is charged with the offence of Murder. The accused is charged with the offence of Murder contrary to Section 203 as read with Section 204 of the Penal code. The offence of Murder (Section 202 Penal Code)

In Andrew Omwenga Vs Republic 2009 eKLR and reiterated by the is court in Republic Vs. Joseph Ekai Lomongin [2018] eKLR;

**“It is clear from the definition that for an accused to be convicted of an offence of Murder, it must be proved that he caused the death of the deceased with malice aforethought by an unlawful act or omission. There are therefore three ingredients of Murder which the prosecution must prove beyond reasonable doubt in order to secure a conviction. They are (a) the death of the deceased and cause of death (b) that the accused committed the offence by unlawful act or omission which caused the death of the deceased and (c) that the deceased had malice aforethought”.**

The prosecution is therefore under obligation to prove

all the above ingredients on the standards of proof of beyond reasonable doubt, This is because the prosecution at all times with few exceptions bears the burden to prove the charge beyond reasonable doubt in *Woolmington Vs DPP* 1935 AC 46Z. *Lord Denning* in explaining the phrase beyond reasonable doubt stated.

*“It need not reach certainty but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadows of doubt. The law will fail to protect the community if it admitted to forceful possibilities to deflect the course of Justice. If the evidence is so forceful against the man to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible but less probable the case is proved beyond reasonable doubt but nothing short of that will suffice. “*

On fact of death and cause of death. The fact of death can be established by evidence of a death certificate; result of a Post Mortem Report; or direct evidence that the person had died

Pw7 Dr. Aaron Ombongi testified that he examined the body of the deceased which had a penetrating stab wound in the Chest leading to rupture of lung leading to collapse. She also had a stab wound on the abdomen. As a result of the examination, he formed an opinion that the cause of death was due to Pulmonary arrest secondary to penetrating stab wound. He produced Post-Mortem report Exhibit 1. This witness not only considered the fact of death but also the cause of death of the deceased.

The second ingredient of the offence is on proper identification of the accused as the person who inflicted the injuries that caused the death of the deceased.

Identification of the accused as the person who caused the death can be proved by direct evidence by witnesses who saw the accused inflict the injury; It can also be established by circumstantial evidence which leads to the presumption that the accused is the only person who had the opportunity of inflicting the injuries sustained; or by evidence connecting the accused to the deceased for instance DNA Profiling of the blood samples of the deceased and the deceased or blood found on items possessed by the accused.

The accused in her evidence testified that she did not stab the deceased and did not know who stabbed her. She testified that on the material day she was informed that the deceased had been stabbed. She went to the scene and saw the deceased lying down and her T-Shirt blood stained. She went and informed the mother and brothers who took the deceased to hospital. She was then arrested the same day. On being cross-examined by Mr. Oimbo for State she reiterated that she had not seen the deceased for a while as the deceased had gone to Nairobi, but was annoyed by the fact that he found her in bed with her husband in 2007. In short, the accused's evidence is that she only came to the scene when the deceased had already been stabbed.

Pw1 Gladys Chepkwemai Kusan testified that she was with the deceased when they met the accused on the way and she then took out a knife and stabbed the deceased. On being cross-examined by M/s Nanzushi for the accused, he stated.

***“The accused was with Wycliff when she met us on the way. She took a phone and gave it to Wycliff. She then removed a knife and stabbed the deceased. I saw the accused stab the deceased. She did not push the deceased to the maize plantation. The accused said to the deceased “utajua leo.” There was a pathway near a maize farm. The deceased fell in the maize farm. We are not related to Wycliff. I did not do anything. Rhoda screamed.”***

Pw9 Wycliff Kipkenting Chonge testified that he was with the accused and others on the way when they met the deceased. The accused then got hold of the deceased and they started quarrelling. On turning to check he saw the accused stabbing the deceased with a knife while screaming “umenicheza akili.” The deceased fell down and the accused ran away. These eye witnesses were with the accused and the deceased when they saw the accused stab the deceased with a knife. The witnesses were people known to the accused; the incident occurred on the road and in broad daylight at 4 p.m. All those points to positive identification of the accused as the person who stabbed the deceased.

The prosecutions must by evidence establish malice aforethought on the part of the accused to prove a charge of Murder. Section 206 of the Penal Code defines malice aforethought; thus

**206 Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances –**

*(a) an intention to cause death of or to do grievous harm to any person, whether that person is the person actually killed or not;*

*(b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person. Whether the person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;*

*(c) an intent to commit a felony;*

*(d) an 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.*

Rex Vs. Tubere S/o Octen 1945 12 EACA 63. The court stated;

**“To determine whether malice aforethought has been established the court should consider the weapon used, the manner in which it is used, the part of the body targeted, the nature of the injuries inflicted, the conduct of the accused before, during and after the incident.”**

In assessing the state of mind of the accused, it must be shown that the accused inflicting the injury knew that death or serious injury were a natural consequent of his act and it does not matter that such knowledge is accompanied by indifference whether death or grievous harm may be caused or even by a wish that it may not be caused. If it is demonstrated that the accused knew that death or serious injury was the intended consequence, or was forceable by the accused and he voluntarily did the act, then the intention to cause death and therefore malice aforethought has been established.

In this case there is evidence that accused was armed with a knife dangerous weapon; the knife. She inflicted injuries on the chest, which houses the crucial organs of the body; and again inflicted injuries on the abdomen too. All these combined demonstrate in my view that the accused intentionally wanted to kill or inflict grievous harm to the deceased and she knew that death or grievous harm was a natural consequence of her act. I am therefore satisfied that the accused had the requisite means rea to demonstrate Malice aforethought in the commission of the offence of Murder.

The accused in her defence alludes to bad blood between her and the deceased as a result of an incident that occurred in 2007 where she found the deceased in bed with her husband. She did not raise any defence of provocation in her evidence. The accused only stated that she was not at scene when deceased was being stabbed and only came later. She maintained that she did not stab the deceased.

From the evidence adduced, I am satisfied that he accused did stab the deceased with a knife on her chest causing serious injuries from which the deceased later died. I am satisfied that the prosecution has proved its case beyond reasonable doubt. I find accused guilty of murder contrary to section 203 as read with section 204 of the Penal Code and convict her accordingly.

**Dated at Bungoma this 29<sup>th</sup> day of October, 2019.**

**S.N. RIECHI**

**JUDGE**