



**REPUBLIC OF KENYA**

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

**CRIMINAL CASE NO. 17 OF 2016**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**JOHN EKAI EKITELA.....ACCUSED**

**JUDGMENT**

John Ekai Ekitela the accused herein, is charged with the offence of Murder, contrary to section 203 as read with section 204 of the Penal Code.

The particulars of this offence are that on the 26<sup>th</sup> day of March 2011 at about 8.00 pm. at Kaibos location within West Pokot County, the accused murdered Eunice Chepkemei.

The prosecution case is that before the deceased got married to the accused person, she was a widow and had three children. After she got married to the accused they got two more children. The eye witnesses to the incident constituting this offence are two of the five children, who gave evidence as PW1 and PW3. Their case is that on 26.3.2011 at about 4.00 p.m., PW1, PW3 and their brothers namely Kibet and Daniel Sang, were at home. Their home constituted of two rooms with an adjoining door opening with no door fixed. One room was used by the parents as their bedroom and the other one was the kitchen and as well the bedroom for the children. There were wooded windows. They were using hurricane lamp (tin lamp) at night. On the material day, the accused got home between 7.00 p.m and 8.00 p.m. He was drunk. He was used to quarrelling and beating the deceased, mostly while drunk. When he got home the deceased had gone outside to the toilet. He asked where she was and the children told him in the toilet. When she got out of the toilet she cleaned her hands. The accused who was in the house locked her outside. The deceased pleaded with him to open the door. He opened the door and got outside armed with a stick. He attacked her with the stick till it broke into pieces. The children witnessed what was happening through the window of which they had opened. There was adequate moonlight from the half moon. The accused got back into the house and took a jembe handle. He moved outside with it and attacked the deceased further, using it. Initially the deceased was screaming and was beaten till she went silent. There was water in a bucket outside. He poured it on her. When he noted that she was not rising, he pulled her into the house. PW 1 moved outside and went to call his grandmother, the PW2 in this case. He found PW2 unwell, down with typhoid. He reported to her that their father was beating their mother and he wonders whether she will survive. He told PW2 that the accused was using a jembe stick in the attack. PW2 asked PW1 to sleep there and he declined saying he will go back to find out what was happening to his mother. He left and went back home.

PW 3 had remained in the house while PW1 was away to call PW2. He witnessed as the accused changed the deceased wet clothes. The deceased was silent. The accused did not sleep but remained just there. At about 5.00 a.m the accused left and went underground. When PW1 got back home, he noted the deceased was motionless and was not breathing. He started crying. His brothers had gone for milk. He screamed attracting nearby neighbours. PW1 went to call PW2. He told her that their mother was not rising from the ground and the accused had escaped. They went to the scene and found neighbours there screaming. The deceased was already dead. They reported the matter to the police. The police visited the scene and confirmed that she was dead.

The body was collected and taken to Kapenguria Hospital Mortuary where on 30.3.2011, PW4 who is a sister to PW2 and therefore an Auntie to the deceased, went and identified the body for postmortem. The postmortem was conducted by Dr. Ochuka who noted the body had bruises on the face, blood from the ear and nose, bruises on the left forearm and right forearm and on the thigh. The head had bruises on the left face of which was swollen and there was bleeding on the left side of the skull. The cause of death was Cardio-pulmonary arrest due to assault with intracranial bleed.

The accused had gone underground. Police had collected a wooden Jember stick, allegedly used in attacking the deceased as an exhibit. On 26.3.2011 at about 8.00 p.m an elderly woman known as Monicah Chebet reported to PW6 at Kapenguria C.I.D Office that the accused had been spotted at Mile Saba Area. PW6 informed the D.C.I.O about it. As arrangements were made to have him arrested, Monicah Chebet called again saying he had escaped.

Later in the year 2014 the police received a signal from Tigoni Limuru, to the effect that the accused had been arrested in another offence where he had threatened to kill his brother. On 12.11.2014 the police made arrangements to have him collected from Tigoni Police Station. They actually went for him there. He was escorted to Kapenguria Police Station where he was charged with Murder. The witness produced

the jembe wooden handle as exhibit 3.

The accused gave a lengthy sworn testimony in his defence and called no witness. In his defence he said he was living at Kaibos, and was a farmer, beer brewer and was also dealing in Charcoal. On 25.3.2011 he woke up early in the morning and went to the farm. He worked there till 8.00 am when he returned home. At home, he did not find his wife. He asked the children where she was and was told she had gone to bath. He warmed the tea and the wife returned as he was taking it. They never spoke. She changed her cloths and left. They had not quarreled. He took tea and went back to the land where he worked till 4.00 p.m. At 4.30 pm he was joined by a neighbour and they deliberated together. This neighbour called Jack, left him to work in the land and requested him to visit him later at home. At about 5.00 p.m the accused went to Jack's home. The deceased went there at 6.00pm. He took Busaa beer. She had ½ Kg of cooking fat. She took a cup of beer and drunk it at once. Mama Nabangala was brewing Chang'aa nearby. The deceased also had some Chang'aa from the place. She then went home ahead of the accused. The accused went home later and found her beating a child. They quarreled and she ran away to her parents' home. Together with her mother, they went to mama Nabangala's home. The accused looked after the children, made bed and they slept. The deceased returned home at Midnight and knocked on the window. She sang while outside. The accused went and opened the door. He saw her near the house wall. She had her hands placed in between her thighs. He went and held her. She was seated alone. She told him not to raise her up.

She alleged she was feeling as if her body was on fire. She requested for drinking water. The accused rushed in the house for it and gave her. She took some and poured the rest on herself. She asked him for more water to pour on her. He took a container, fetched water and poured it on her. It was very cold outside. She was no longer talking. He got some clothes from the house and changed her. He then took her into the house and they slept. The following morning, he woke up at 5.00 a.m. He did not check on her but went to Kaibos Forest. He worked at the forest. At 8.00 a.m he switched on the phone. He was called by Rotich who told him that his wife had passed on. He was in shock and Rotich told him to get as far as the police were going to collect the body. Jack called him later and asked him what he did yesterday as his wife was dead. The deceased's sister called thereafter crying. The accused decided to leave the place. He went to Kapsara out of shock. He worked there for 3 weeks. He was paid and went to Kilimanjaro. He worked there for 3 months and decided to go back home to look after the children. While back home he was in excessive fear. In the year 2014, he went to seek employment in Nairobi. He was suspended and for the next 2 months he was without a job. A cousin called him for employment in Malaba. He travelled there and was employed. His brothers were jealous of the handsome amount he was earning. They caused his arrest on 12.11.2014. He was taken to Tigoni Police Station. The brother complained that he was threatening him. He is the one who fixed him with the Murder case. He was charged in Limuru and on 16.11.2014 the police picked him for the murder case. He denied the offence.

In a case of murder, the ingredients of the offence of which the prosecution are supposed to establish beyond reasonable doubt are:-

1. The fact of death of the deceased.
2. The cause of death; proof that the deceased met her death as a result of an unlawful act or omission on the part of the accused person; and
3. Proof that the said unlawful or omission was committed with malice aforethought.

On the first issue of the death of one, Eunice Chepkemei, there is no doubt in the case that she passed on, on 26<sup>th</sup> day of March 2011. The evidence of PW1, PW2 and PW3 is to the said effect, and the postmortem report buttresses the fact.

As to the cause of her death the evidence of PW1, PW2 and PW3 is crucial. PW1 and PW3 witnessed the accused who is their father beating their mother to the point of killing her. They were consistent and firm in their evidence that he did so using a wooden jembe handle. There was enough half-moon light outside which enabled them witness the incident through the wooden window of which they had opened. It is crucial to note that PW1 sensed danger for his mother and went at night to report to PW3, their grandmother. Even when he was asked to sleep there, he could not as he said he wanted to find out about his mother's condition. His evidence to the extent is corroborated by that of PW3. The accused himself to some extent also corroborated the two boys evidence that he is the one who poured water on the deceased, got her into the house and changed her clothes. The boys knew their parents well and there is no evidence that there was any other suspect at the scene.

They could not have made a mistake of their own father. They saw him attack their mother with a jembe handle till she fell down unconscious. The postmortem report shows she died out of injuries consistent with the alleged assault.

I have no doubt that it is the accused person's unlawful act of assaulting her, that led to her death.

Malice aforethought is defined under section 206 of the Penal Code. It is deemed to be established by evidence proving any one of or more of the following circumstances: -

- a) An intention to cause the 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 that 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 intention 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.

The evidence by PW1 and PW3 shows the accused poured water on the deceased when she fell down dead or unconscious, and must have done so in an effort to resuscitate her. This would suggest it was not his intention to kill her. However, his attack of her with a heavy item, in this case a Jembe wooden handle, on the head, shows he had intention to do grievous harm to her, of which is a felony. His choice of weapon, area of attack and force used must have been clear to him that he would probably cause the death or grievous harm to the deceased. What he actually caused is her death. "Malice afterthought" is therefore also proved beyond reasonable doubt.

The accused defence is a lie and an afterthought. It is highly in want of facets of truth. He portrays himself in it as a person who loved and cared for his children and wife. However, having cared for her while unwell, and slept together while she was still unwell, he left early in the morning at 5.00 am without checking on her condition. When he later heard she was dead, he allegedly, out of shock, ran away and never went back home, even for her burial. Shock incapacitates a person from taking flight; it is fear which induces one to take cover. Outrightly the accused lied in his defence. He ran away from home after he realized he had killed his wife and would be arrested and for that abandoned his children. His defence was also an afterthought as it did not arise during cross examination of mostly PW1 and PW3. It is of no positive effect as a defence and is hereby dismissed.

The upshot is that the offence against the accused, of Murder, is proved by the prosecution beyond reasonable doubt, and he is convicted of it under section 203 as read with section 204 of the Penal Code.

Judgment read and signed in the open court in presence of Mr. Ndarua holding brief for Mr. Nyamu for the accused, Ms Kiptoo for the State and the appellant, this 20<sup>th</sup> day of June, 2018.

**S. M. GITHINJI**

**JUDGE**

**20.6.2018**

**20.6.2018**

Coram: Justice S. M. Githinji – SRM

Court clerk – Barasa/Nicholas

State Counsel – Madam Kiptoo

Mr. Ndarua holding brief for Mr. Nyamu for the accused

**MADAM KIPTOO**

He is a first offender.

**MR. NDARUA**

He is a first offender. He is remorseful for the offence. We urge the court to be merciful.

**COURT**

I have considered the circumstances under which the offence was committed. That the convict is a first offender and is remorseful.

He is sentenced to serve life imprisonment. Right of Appeal 14 days.

**S. M. GITHINJI**

**JUDGE**

**20.6.2018**