



**REPUBLIC OF KENYA**

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

**CRIMINAL CASE NO. 13 OF 2017**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**JULIUS KIPNGENO KOECH.....ACCUSED**

**JUDGEMENT**

**INTRODUCTION**

1. The accused is charged with murder contrary to section 203 as read with 204 of the Penal Code (Cap 63), Laws of Kenya in respect of the deceased namely Leonard Langat Kirui. He pleaded not guilty. The prosecution called 7 witnesses in support of the charge.
2. The court on its own motion called NO. 92813 PC (W) Emmy Chepkoech pursuant to the provisions of section 150 of the Criminal Procedure Code (Cap 75), Laws of Kenya.
3. The accused pleaded not guilty. In his defence the accused made an unsworn statement and called no witnesses.
4. At the close of the trial, Mr. Ombati for the accused filed written submissions in support of the acquittal of his client. The prosecution did not file any submission because the law does not permit them to do so in terms of sections 310 and 161 of the Criminal Procedure Code (Cap 75), Laws of Kenya.

**The case for the prosecution**

5. The prosecution called Jane Chepkwony (PW 6). PW 6 testified that the wife of the deceased went running into her home. She told her that her deceased husband was chasing her. Apparently, shortly thereafter, the deceased arrived and asked her (PW 6) for ugali (food). She told him that she did not have any food. PW 6 also testified that the accused went to his home shouting; "*bibi toka nje nimemkatakata.*" PW 6 recognized both the voices of the deceased and the accused person.
6. It was also her evidence that the deceased was drunk, when he was chasing his wife. She also testified that the accused was also drunk. Finally, she testified that there was no love affair between the deceased and wife of the accused.
7. The next witness called by the prosecution was No. 97069786 APC Evans Osoro (PW 5). He testified that he was attached to Olmugenyo AP post. It was his evidence that on 2/3/2016 at 4.00 p.m., a man who is now the accused, went to the post and told him that he had slashed someone for having an affair with his wife. He arrested him. This man looked exhausted and asked for drinking water, which he gave him.
8. The police were informed of this murder case and they went to the scene of murder at Chepalungu in South Narok. No. 84046 PC Nicholas Njoroge (PW 7) visited the scene of murder in the course of his investigations. Upon arrival at the scene, he saw the body of the deceased with cut injuries on the neck and he also saw a maasai sword at the scene of murder. He also testified that at about 7.30 pm, the wife of the deceased went running to the home of PW 6 being chased by her deceased husband.
9. The body of the deceased was taken for postmortem examination, which was done by Dr. Mutai Titus (PW 2). This body was identified by Richard Langat (PW 1). PW 2 found the following. He found the deceased to be 27 years old. He also found that he had a deep cut wound on the neck running from the mandible to below the left ear. Furthermore, he found the left jugular and carotid vessels injured with massive bleeding. In his opinion the cause of death was due to cardio-respiratory arrest secondary to hypovolemic shock, secondary to massive bleeding following an assault with a sharp object. He then produced the report of the postmortem examination as exhibit 1.
10. In addition to the foregoing, the police took the accused for mental status examination to Narok Referral Hospital. The examination was done by Isaac Kenyanya (PW 7), who was a clinical officer specializing in mental health and counseling in Psychology. After examining the accused, he found him to be mentally fit to stand trial. He assessed his age to be 27 years old. Thereafter, he put in evidence the report of his

examination as exhibit 6.

11. Furthermore, the prosecution called No. 231386 CIP Josephine Mumbua Wambua (PW 3). She testified that she took a charge and cautionary statement from the accused through a kipsigis speaking interpreter namely P.C. Emmy Chepkoech. She then put in evidence the charge and cautionary statement as exhibit 2. In that statement the accused confessed killing the deceased because he found the deceased making love with his wife.

### **The case for the accused**

12. The accused made an unsworn statement, in which he stated that the deceased and himself used to sell maize. On 1/3/2015, they went to the house of Mberegu and drunk busaa (traditional liquor). Thereafter they went to the house of Rose where they drunk chang'aa. After finishing drinking chang'aa, they moved to the next house, where they drunk chang'aa until 6 pm. He further stated that the deceased bought him chang'aa.

13. After drinking, the accused decided to go to his home. Upon arrival at his home, he found the door to his house locked. He further stated that he knocked four times but no one opened for him. In that house, there was his wife and children. He then decided to sleep outside his house.

14. Thereafter, he heard the door of his house opening. As he was entering, his wife escaped. And while at the door, the deceased hit him as a result of which he decided to escape with the deceased running after him. He further stated that eventually the deceased got hold of him and a struggle ensued. The deceased then removed his knife intending to stab him. Finally, he stated that after the struggle between him and the deceased he did not know what happened. He only recalls waking up and found himself in Tegat village, where a young man told him that he had fought with the deceased. As a result, he surrendered himself to Mekenyu police station, from where he was taken to Narok police station.

15. Mr. Ombati filed written submissions in support of the defence. He submitted that the accused did not have any malice aforethought which is necessary to establish the commission of the offence of murder. He further submitted that the prosecution did not prove malice aforethought in terms of section 206 of the Penal Code. It was also his submission that under section 25A (1) of the Evidence Act (Cap 80) Laws of Kenya, a confession taken by a police officer must be done in the presence of a 3<sup>rd</sup> person chosen by the accused. In the instant case, this was not the position. By necessary implication, counsel was submitting that the confession is not admissible for that reason.

16. Finally, counsel submitted that both the accused and deceased were drunk and for that reason, the accused did not have malice aforethought. He therefore urged the court to find that murder was not proved.

### **Issues for determination**

17. In the light of the foregoing evidence, and the applicable law, I find the following to be the issues for determination.

1. Whether or not the accused caused the death of the deceased.
2. Whether or not the evidence discloses murder or manslaughter.

### **Issue No. 1**

18. There is evidence of Jane Chepkwony (PW 6) that the accused went to her house and shouted: "*bibi toka nje nimemkatakata.*" This was in reference to the accused inflicting cut wounds on the neck of the deceased. In this regard, the post mortem report which was put in evidence as exhibit 1 shows that the deceased had a deep cut wound on the neck extending from the mid mandible to below the left ear, which was approximately 12 cm long. It also shows that the left jugular and carotid vessels were injured with massive bleeding. According to the report, the cause of death was cardio-respiratory arrest secondary to hypovolemic shock secondary to massive bleeding following an assault with a sharp object.

19. It is clear from the foregoing evidence that the shouting by the accused person that he had inflicted cut wounds on the deceased is supported by the report of the postmortem examination. PW 6 knew the accused as a neighbour. Additionally, she knew and recognized the voice of the accused.

20. In addition to the foregoing evidence. There is the confessional statement of the accused which was taken under charge and caution by CIP Josephine Mumbua Wambua (PW 3). The statement was produced as exhibit 2. In that statement, the accused confessed killing the deceased because he found him have a love affair with his wife.

21. Pursuant to section 150 of the Criminal Procedure Code (Cap 75) Laws of Kenya, I called No. 92813 PC (W) Emmy Chepkoech on my own motion as a witness. This is the police officer who interpreted the kipsigis language statement of the accused into English PW 3. Had I not called this police officer who was an interpreter, the charge and cautionary statement of the accused would have amounted to inadmissible hearsay evidence. It is undesirable to use police officers as interpreters in confessions if they are engaged in the investigations unless there is no alternative. See *R. v. Sidiki Kyoyo (1943) 10 EACA 103*

22. Mr. Ombati for the accused submitted that the above confession is inadmissible by virtue of the provisions of section 25A (1) of the Evidence Act (Cap 80) Laws of Kenya. These provisions which are couched in mandatory language require the presence of a third person, chosen by the accused when Chief Inspector Josephine Mumbua Wambua, was recording the confession of the accused. There was no such third person.

23. According to counsel, the absence of such a third person made the confession inadmissible. Admittedly the confession was obtained in contravention of the provisions of section 25(4) (1) of the Evidence Act.

24. The submissions of counsel lost sight of the fact that the aforesaid provisions are subject to the provisions of article 50(A) of the 2010 Constitution and they therefore take precedence over section 25(A)(1) of the Evidence Act. Those constitutional provisions state that “evidence obtained in a manner that violates any right or fundamental freedom in the Bill of Rights shall be excluded if the admission of that evidence would render the trial unfair or would otherwise be detrimental to the administration of justice.”

25. It is clear that those provisions make admissible evidence obtained in contravention of the Evidence Act if it is relevant and is not prejudicial to the fair trial rights of the accused.

26. In the instant case the confession was obtained voluntarily without any objection by the defence counsel. The confession is relevant and has probative value. It has not caused any prejudice to the accused. Additionally, its admission will not bring the administration of justice into disrepute. It also is not detrimental to the administration of justice.

27. It also follows that the confession of the accused made to No. 9706786 APC Evans Osoro on 2/3/2016, that he had slashed a person (the deceased), who was having a love affair with his wife is also admissible. This oral confession was made voluntarily and without objection from the defence counsel. It also did not cause prejudice to the accused notwithstanding that the confession was made to this officer, who held the rank of a police constable in the administration police. It is important to point out that it is only confessions that are made to a police officer holding the rank of inspector and above that are admissible.

28. It is to be borne in mind that the accused voluntarily surrendered himself to APC Evans Osoro. According to this police officer, the accused appeared exhausted. At his request, the officer gave him water to drink.

29. Furthermore, the instant case is not dissimilar to the Kenya Privy Council decision in *Kuruma son of Kaniu v. Regina (1955) AC 197, All ER 236* of the Criminal Procedure Code (Cap 75) Laws of Kenya, in which illegality or improperly obtained evidence was held to be admissible. In that case the court pointed out that the test of admissibility was relevance. That court also made it very clear that “in a criminal case a judge always has a discretion to disallow evidence if the strict rules of evidence would operate unfairly against the accused.” (*Kuruma son of Kaniu v. Regina (1955) AC 197, 204*).

30. The upshot of the foregoing is that I find that it is the accused who inflicted the fatal cut wounds on the deceased as testified to by Jane Chepkwony. This is clear from her evidence that she escaped from her house, when she heard the accused stating that he had killed him. He therefore caused the death of the accused. Furthermore, I find that the accused confessed to CIP Josephine Mumbua Wambua (PW 3). He also confessed to APC Evans Osoro (PW 5) that he slashed the deceased because he found him in the act of making love with his wife.

## **Issue 2**

31. I find from the evidence that the offence disclosed is that of manslaughter. In this regard, I find that both the deceased and the accused were very drunk. Furthermore, I find that the accused found the deceased in the act of making love with his wife. This is clear from the evidence of Jane Chepkwony. It therefore follows that the accused did not have the *mens rea* for murder (malice aforethought) in terms of section 206 of the Penal Code. Pursuant to section 322 (1) of the Criminal Procedure Code, I find the accused guilty of manslaughter contrary to section 202(1) of the Penal Code.

**Judgement delivered in open court this 28<sup>th</sup> day of November, 2018** in the presence of Mr. Omwega for the state and Mr. Ombati for the accused.

**J. M. Bwonwonga**

**Judge**

**28/11/2018**