



**REPUBLIC OF KENYA**

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

**CRIMINAL DIVISION**

**CRIMINAL (MURDER) CASE NUMBER 19 OF 2015**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**SAMSON LIMAKORI .....ACCUSED**

**CORAM: LADY JUSTICE RUTH N. SITATI**

**JUDGMENT**

**Introduction**

1. The accused person in this case, Samson Limakori, is charged with *Murder contrary to section 203 as read with section 204 of the Penal Code*, the particulars of the offence being that on the 5<sup>th</sup> day of June within West Pokot County, he murdered CS. The deceased was wife to the accused. The accused person took plea on 15<sup>th</sup> July, 2015. He denied committing the offence. The prosecution initially called 5 witnesses who testified against the accused, but at the instance of the court, the sixth prosecution witness was called to give evidence touching on the post mortem examination report.

**Prosecution Case**

2. PW1 in this case was IC, a daughter to both accused and deceased. She testified that on 5<sup>th</sup> June 2015 at around 11.00pm, she was asleep at the home of one Kokating'o, a neighbor when the accused person went to Kokating'o's home and woke her up. He asked her to go and check on her mother who was dead. Because she could not stand the idea of seeing the body of her mother, PW1 (I) ran away instead. The accused told I that the deceased had died in the forest after taking beer. When Irene ran away, she went to sleep in the house of another neighbor known as Kapelisha until morning when she went to see the deceased's body. Irene also testified that though the deceased had plaited her hair when she left home, the deceased's head was shaven when she saw her on that morning. She also stated that the deceased's beaded belt which she wore before leaving home had been removed and placed beside the body. Thereafter the police removed the body to Kapenguria General County Referral Hospital Mortuary. By that time, the accused person had already been arrested.

3. During cross examination, Irene told the court that on 5<sup>th</sup> June 2015 when she went to play she left the deceased and the accused at home. She also testified that though the accused and the deceased used to quarrel, she had never seen them fight, and further that when accused woke her up on that fateful night, he did not tell her that he had fought the deceased. She also testified that when she went to the scene, she saw some hair, a lesso and the deceased's beaded belt.

4. PW2, HP a young boy who appeared to the court to be below 16 years of age was taken through a *voire dire* examination before he testified. After being satisfied that the young man possessed enough intelligence to offer evidence, and that he also understood the nature and the meaning of an oath, the court allowed him to give sworn evidence. PW2 (H) testified that at about 11.00pm on 5<sup>th</sup> June, 2015 he was asleep at their home when the accused person herein, who is his father, woke him up and asked him (H) to accompany him as he was going to check on his mother who he said was on the other side of the ridge. The accused told H the mother was dead. On hearing the news of his mother's death, H screamed and his screams attracted neighbours into the home.

5. On reaching the other side of the ridge where the body of the deceased was, other people gathered there, but the accused person did not say what had killed the deceased. H did not notice any visible injuries on the body of the deceased. H, like Irene, told the court that the deceased's body was lying on a footpath in a maize garden.

6. Kochesam Bumoreng was PW3. She recollected that on 5th June, 2015 at about 4.00pm, she was at her home when the deceased went there to ask for maize. The deceased was alone. PW3 (Bumoreng) gave her 2kgs of maize which the deceased carried in a bucket. The deceased then joined her husband who was standing about 200metres ahead of her and the two went away together. They went towards their

home. Later on Bumoreng learnt that the deceased had been killed after she left Bumoreng's home.

7. During cross examination, Bumoreng testified that though the deceased was the only one who entered her compound to ask her for maize, she (Bumoreng) could still see the accused who was standing at some distance from her house. Though Bumoreng did not see the accused kill the deceased, the information she received was that it was accused who had killed the deceased.

8. PW4 was Thomas Limakou (Thomas) the village elder (Mukasa) of Ywalateke village. He testified that while at his home at about 11.00pm on 5<sup>th</sup> June, 2015 he heard screams by a boy and a girl with the girl saying “**stop holding me.**” Thomas then went to where the screams were coming from. He found the accused person holding Irene's hand. Then the accused person told him that his (accused's) wife had died. The accused cried as he said so.

9. When Thomas asked the accused where the deceased's body was, he said it was on the next ridge. While Irene ran away, Thomas accompanied the accused person and H across the river to a maize plantation where the deceased's body was lying. After pointing out the body to Thomas, the accused person vanished into the night without even saying what or who had killed the deceased whose body was lying in the maize plantation. According to Thomas, there were many footsteps at the scene.

10. Thomas and the other people who had answered to the screams kept vigil where the body of the deceased was until morning when he called the area chief. Thomas also saw a lessso, some hair and a belt near the body. There were no visible injuries on the body. Later, Thomas learnt that accused person had surrendered himself to police. He also testified that the accused person appeared drunk on the material night. Thomas also testified that the accused person used to beat his wife and children often.

11. During cross examination, Thomas testified that when he observed the scene, it appeared as if the deceased's body had been dragged into the maize plantation. Thomas also testified that during the day the deceased had attended a campaign meeting and that she was dressed in a grey skirt and not in a lessso, though the lessso and the belt he saw at the scene belonged to her. Thomas also confirmed that both accused person and the deceased used to drink beer, though he could not say whether the deceased took any beer on the material day, but he recollected that he had resolved many family disputes involving the couple.

12. Number 47928 PC Boniface Wayongo testified as PW5. He told the court that he took over conduct of the case from his predecessor, the late CPL Ochieng on 30<sup>th</sup> August, 2016. According to his evidence, the incident was reported at the Kapenguria Police Station on 5<sup>th</sup> June 2015 by Thomas. PC Wayongo also told the court that by the time he took over the case, the investigations had been completed. CPL Wayongo was however not in a position to produce the exhibits which had been preserved by CPL Ochieng.

**13.** The prosecution case had closed without the medical evidence of the doctor who performed the post mortem examination on the body of the deceased. After reading through the evidence on record, including the defence given by the accused person and before writing this judgment, this court found it absolutely necessary to call for and hear the medical evidence of the post mortem examination to enable it make an informed decision in this matter. The court proceeded to call for this evidence pursuant to the provisions of **section 150 of the Criminal Procedure Code.**

14. Dr. Jotham Mukhola of Kapenguria County Referral Hospital testified as PW6. He did so on behalf of Dr. Rono who had since left the hospital to pursue further studies at Moi Teaching and Referral Hospital. The post mortem examination on the body of the deceased was conducted on 8<sup>th</sup> June, 2015. From the examination, Dr. Rono made the following findings:-

The body had moderate rigidity

There was swelling and discolouration on the skull and in the areas around the skull.

There were bruises on the front part of the neck, the largest of which was 3cm laterally.

There was bleeding in the front part of the eyes, due to lack of oxygen

The lips and tongue were bluish in colour

Internally, there was generalized bleeding and excess carbonation in the lungs.

15. Dr. Rono formed the opinion that the cause of death was lack of oxygen supply due to strangulation. The duly signed certificate number 190356, was produced as Pexhibit 1.

16. During cross examination, Dr. Mukhola told the court that though Pexhibit 1 was duly signed it did not have the name of the doctor who signed it. He however confirmed that the signature on the report was that of Dr. Rono. He also testified that the hospital rubber stamp was missing. Dr. Mukhola also testified that if a person falls headlong from a high point, the neck would get fractured and that such a person would not die from lack of oxygen. He also testified that from the examination, there was no evidence to suggest that the deceased's neck had been twisted. Dr. Mukhola denied a suggestion that his colleague Dr. Rono did not do his work with the diligence it deserved.

### **Case to Answer and Defence**

17. By a ruling delivered on 18<sup>th</sup> July, 2018, this court found that the accused person herein had a case to answer and placed him on his defence. The accused gave sworn evidence but did not call any witnesses. He recalled that on 5<sup>th</sup> June 2015, he woke up early as there was going to be a political rally at Natelem Primary School. Both himself and the deceased prepared for the meeting and did go to the meeting.

After the meeting the local Member of Parliament (MP) gave out Kshs.300/- to each of the people who had attended the rally. More money was given out after the MP had addressed the people. In total, the accused received Kshs.1,500/-.

18. The accused also stated that at about 1.00pm, he and the deceased returned to their home for lunch but the deceased told him that the only flour they had would be used for the evening meal. The accused then left for a busaa den at the home of one of their neighbours, with the deceased promising to follow him after preparing porridge for the children.

19. The accused then went to a second political rally where more money was dished out to those present. This was about 3.00pm and thereafter, the accused went back to the busaa den since he had not found the brewer when he went to her home earlier. The accused said he passed by Bumoreng's home where the deceased caught up with him and asked him where he was going. The deceased did not want him to go to the home of one Beatrice for busaa. The two of them then went and stayed together at Rosa's home where they took changaa for a long time up to 10.00pm in the night. Both accused and deceased were, according to him, completely drunk as they left for their home, going up and down the hills. As they made their way home, some rain fell, forcing the deceased to walk on all fours over the rocky and slippery terrain. Then he heard her scream as she fell and rolled down the steep hill.

20. The accused stated further that after the deceased fell, he went to her rescue, but found he could not lift her up because she was heavy. In the process of trying to pull her up, the deceased rolled again several times. When it became clear that he could not get the deceased up the hill, he screamed for help but no one responded. He therefore left the deceased where she was as he rushed home to get help. When he could not find neighbours to help him, he went to his home and called Hosea and his daughter Irene. Both children screamed when he told them that their mother had died. He also screamed; the screams attracted Thomas. He went back to where he had left the deceased and found she was already dead.

21. Thereafter, the accused went to the area chief and reported the incident. He also went and reported the matter at Kapenguria Police Station at around 6.00am on the same day. He was put in cells. He denied killing the deceased and told the court that the deceased died because of rolling down the hill.

22. During cross examination, the accused person stated that though he had taken chang'aa from 3.00pm up to about 10.00pm, he was still able to manage himself. He also testified that there were other people at Rosa's chang'aa den, but when he left, he walked away just with the deceased, and that he only pulled her to save her. He denied strangling her. The accused person did not call any witnesses.

### **Submissions**

23. The defence filed written submissions in which it urged the court to make a finding that the prosecution had not proved all the four ingredients of the offence of murder and to acquit the accused person. Counsel relied on several authorities which the court has had the opportunity to read through and to consider. In response, prosecution counsel submitted that the prosecution had proved its case against the accused person to the required standard, and urged the court to find the accused person guilty as charged, convict him and sentence him appropriately.

### **Issues for Determination**

24. Under the provisions of *Sections 203 and 206 of the Penal Code, Cap 63 Laws of Kenya*, the prosecution must prove each of the following ingredients if the case of murder is to succeed:-

- a. The fact of death of the deceased.
- b. The cause of such death
- c. The fact that the death resulted from an unlawful act or omission on the part of the accused person;
- d. That in causing the death of the deceased, the accused person acted with malice aforethought.

25. While the defence contends that the prosecution failed to prove the four ingredients beyond any reasonable doubt, the prosecution submits that the evidence on record clearly proves each of the four ingredients of murder beyond any reasonable doubt. I shall now consider each issue in turn.

#### **a. Whether the prosecution proved the fact of death**

26. There is no doubt in this case that the deceased died. Both I, PW1 and H PW2, confirmed to the court that on the night their mother died the accused person, who is their father came home at about 11.00pm and asked them to accompany him to where the body of their mother was lying. Whereas Irene could not withstand the situation, Hosea accompanied the accused person and viewed his mother's lifeless body which was lying on its back. Thomas also accompanied the accused person to the scene and confirmed to the court he saw the body of the deceased.

27. There is also medical evidence by Dr. Mukhola that indeed the body of one Chemakal Samson was examined at the Kapenguria County Referral Hospital on 8<sup>th</sup> June 2015 by Dr. Rono, and a Death Certificate to that effect was produced in court as Pexhibit 1.

#### **b. Whether prosecution proved the cause of death**

28. According to the testimony of Dr. Mukhola, the cause of the deceased's death was lack of oxygen due to strangulation. According to the accused person, the deceased, who he said was totally drunk at the time fell down the cliff and he only tried hard to get her up from where she had fallen but he was unable to do so. He then screamed for help but when no help was forthcoming he ran home. The deceased, according to the accused person, was still alive when he left her down the steep hill.

29. The medical evidence adduced in court by Dr. Mukhola gave the cause of death as lack of oxygen due to strangulation. Dr. Mukhola also testified that the physical examination of the deceased's body revealed some bruises on the front part of the neck, and further that there was discolouration and swelling on the skull and on the areas surrounding the skull. The accused person in his evidence in chief and during cross examination of Dr. Mukhola put forward the theory that the deceased died because of a fall. This theory was however demolished by the medical evidence which showed that the neck bone was intact. According to Dr. Mukhola, if indeed the deceased had fallen headlong as suggested by the accused person, her neck bone could not have survived. Further Dr. Mukhola disputed the accused person's contention that the lack of oxygen could have been caused by a fall.

30. From the above, this court is satisfied that the deceased was strangled as evidenced by visible bruises on the front part of the neck. It was not necessary to call an eye witness for proof of the cause of death. The medical evidence which has displaced the evidence by the defence is sufficient to prove the cause of death.

**c. Whether the deceased died as a result of an unlawful act or omission on the part of the accused person**

31. Although the accused person had initially denied that he was in the company of the deceased when she was last seen alive walking away from the home of Bumoreng, PW3 there is ample evidence on record confirming that the accused person was the last person to be seen in the company of the deceased before he ran home and told his family and neighbours that the deceased had died. In fact, he testified that when he left Rosa's house, he and the deceased were together and there was no one else with them. This being the case, he is the only person who can explain how the deceased died. It was Bumoreng's evidence that after she had given the deceased 2kg of maize, the deceased joined the accused person who was standing at some distance from Bumoreng's house and that she saw the two as they walked away together. The accused person himself told the court that he and the deceased went on a drinking spree together from 4.00pm to 10.00pm. He also confirmed that on the day in question, he passed by Bumoreng's house.

32. Further, according to I, when she left home to go and play, she left both the deceased and the accused person together at home. In his evidence, Thomas testified that when he went to the scene, he noticed that the body of the deceased appeared to have been dragged to the maize field where it was found lying and further that when he and the accused person got to the scene, the accused person vanished and left Thomas, Hosea and other people at the scene. The accused person did not walk away leaving his young children and neighbours with deceased's body for nothing.

33. It is my considered view that in strangling the deceased the accused person committed an unlawful act which resulted in the death of the deceased.

34. The defence has contended that since the evidence in this case is circumstantial, it should not form the basis of a conviction. That may be so but there is other evidence showing that the accused person was the last person to be seen with the deceased near the home of Bumoreng at about 4.00pm on the material day. The authorities cited by counsel to support the accused person innocence deal with cases where the accused persons therein were found guilty because of suspicion. In the instant case, it is not a matter of suspicion. It is a matter of fact. The accused person's rescue efforts were a sham because the evidence against him is water tight: That he strangled the deceased.

**d. Whether the accused person acted with malice aforethought.**

35. **Section 206 of the Penal Code** sets out the circumstances which constitute malice aforethought. My considered view in this case is that by strangling the deceased the accused must have known that such an act would probably cause the death of or grievous harm to some person whether the person is the person actually killed or not. It is also my considered view that by strangling the deceased, the accused person intended to cause the death of the deceased or to do grievous harm to her. It is immaterial that the accused person and the deceased used to live peacefully before. On this particular day the accused person's actions pointed to the fact that his intentions towards the deceased were not to let her live but to kill her or to do grievous harm to her. Even if the deceased had lived there is evidence on record that the accused had indeed caused grievous harm to her. The conclusion of this matter is that in killing the deceased, the accused person acted with malice aforethought. He knew exactly what he was doing and there is no excuse for his actions.

**Conclusion**

36. From all the above analysis, this court is satisfied beyond any doubt that the accused person herein murdered the deceased. Accordingly the court finds SL guilty of the murder of CS and convicts him accordingly under **section 322(1) of the Criminal Procedure Code**.

37. It is so ordered.

**Judgment delivered, dated and signed in open court at Kapenguria on this 28<sup>th</sup> day of November, 2018.**

**RUTH N. SITATI**

**JUDGE**

**In the Presence of**

M/S Kiptoo – present for the state

M/s Bartilol – present for the accused

Mr. Juma – Court Assistant

**28.11.2018**

Before me: Hon R. N. Sitati – LJ

Court assistant – Juma

M/S Kiptoo – present for state

M/S Bartilol – present for accused

Accused – present in court

**COURT**

Judgment delivered, dated and signed in open court here at Kapenguria on this 28<sup>th</sup> day of November, 2018.

**RUTH N. SITATI**

**JUDGE**

**28.11.2018**

**M/S KIPTOO**

We do not have any previous records of accused. He may be treated as a first offender.

**RUTH N. SITATI**

**JUDGE**

**28.11.2018**

**M/S BARTILOL IN MITIGATION**

The accused is remorseful. He regrets his actions that led to the death of his wife whom he dearly loved. The accused person is a father who has young children. The children wholly depend on him. The offence was committed when both parties were drunk. The accused is a first offender. In the interest of justice, we pray for a non-custodial sentence. We humbly pray for leniency. He has spent 3 years in remand and has learnt his lesson.

**RUTH N. SITATI**

**JUDGE**

**28.11.2018**

**COURT**

The offence committed by the accused person is a serious offence, especially when he chose to deprive his children of their mother. It is doubtful that the accused loved the deceased.

However, the above notwithstanding, the court will wish to have a pre-sentence report to enable it pass an appropriate sentence in this matter. This follows the Supreme Court judgment in *Francis K. Muruatetu & another versus Republic [2017] eKLR*.

Accordingly, it is ordered:-

- 1. The DR shall immediately call for and avail a pre-sentence report on accused.**
- 2. Mention on 8.1.2019 before to confirm filing of report and taking a date for sentencing.**

**3. Accused remanded in custody.**

**RUTH N. SITATI**

**JUDGE**

**28.11.2018**